(11)

No. 03-1696
Title: Exxon Mobil Corporation, Exxon Chemical Arabia, Inc., and Mobil Yanbu Petrochemical Company, Inc., Petitioners
v.
Saudi Basic Industries Corporation
Docketed: June 24, 2004
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (02-2130)
Decision Date: March 24, 2004
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 22 2004	Petition for a writ of certiorari filed. (Response due July 26, 2004)
Jul 22 2004	Brief of respondent Saudi Basic Industries Corporation in opposition filed.
Aug 3 2004	Reply of petitioners Exxon Mobil Corporation, Exxon Chemical Arabia, Inc., and Mobil Yanbu Petrochemical Company, Inc. filed.
Aug 4 2004	DISTRIBUTED for Conference of September 27, 2004.
Oct 4 2004	DISTRIBUTED for Conference of October 8, 2004.
Oct 12 2004	Petition GRANTED.
Nov 22 2004	Joint appendix filed.
Nov 23 2004	Brief of petitioners Exxon Mobil Corporation, Exxon Chemical Arabia, Inc., and Mobil Yanbu Petrochemical Company, Inc. filed.
Nov 24 2004	Brief amici curiae of Defenders of Property Rights, et al. filed.
Dec 15 2004	SET FOR ARGUMENT ON Wednesday, February 23, 2005.
Dec 15 2004	CIRCULATED.
Dec 20 2004	Extension of time within which to file respondent's brief on the merits to and including January 4, 2005.
Jan 4 2005	Brief of respondent Saudi Basic Industries Corporation filed. (Distributed)
Jan 18 2005	Supplemental brief of respondent Saudi Basic Industries Corporation filed. (Distributed)
Jan 18 2005	Record received from U.S.C.A. 3rd Circuit. (1 envelope and 1 box containing 4 sealed envelopes)
Jan 25 2005	Record received from U.S.D.C. for New Jersey. (4 boxes)
Feb 3 2005	Reply of petitioners Exxon Mobil Corporation, Exxon Chemical Arabia, Inc., and Mobil Yanbu Petrochemical Company, Inc. filed. (Distributed)
Feb 22 2005	Letter from counsel for the respondent and attached order received. DISTRIBUTED.
Feb 23 2005	Argued. For petitioners: Gregroy S. Coleman, Austin, Tex. For repondent: Gregory A. Castania, Washington, D.C.

Supreme Court, U.S.
FILED

No. ___ 031696 JUN 2 2004

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,

Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

ANDREW S. POLLIS
DAVID J. MICHALSKI
HAHN LOESER & PARKS LLP
3300 BP Tower
200 Public Square
Cleveland, Ohio 44114
(216) 621-0150

ELIZABETH J. SHER
PITNEY, HARDIN, KIPP & SZUCH LLP
200 Campus Drive
Florham Park, New Jersey 07932
(973) 966-6300

* Counsel of Record

JAMES W. QUINN
DAVID LENDER
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

GREGORY S. COLEMAN *
CHRISTIAN J. WARD
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

May the *Rooker-Feldman* doctrine, which bars lower federal courts from conducting de facto appellate review of decisions by state courts, be expansively interpreted to additionally incorporate preclusion principles and divest federal courts of jurisdiction solely because a pending state-court proceeding presents identical issues, notwithstanding the long-established system of dual federal and state jurisdiction?

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner Exxon Mobil Corporation has no parent corporations, and no publicly held corporation holds ten percent or more of its stock. Petitioner Exxon Chemical Arabia Inc. is wholly owned by Exxon Overseas Corporation, which is wholly owned by Exxon Mobil Corporation. Petitioner Mobil Yanbu Petrochemical Company Inc. is wholly owned by Mobil Petroleum Company Inc., which is wholly owned by Mobil International Petroleum Corporation, which is wholly owned by Mobil Corporation, which is wholly owned by Exxon Mobil Corporation.

Respondent Saudi Basic Industries Corporation (SABIC) is a Saudi Arabian corporation that is owned seventy percent by the Kingdom of Saudi Arabia and thirty percent by private investors. No publicly held corporation holds ten percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

The *Rooker-Feldman* doctrine has historically served an important but limited role of preventing the lower federal courts from exercising subject matter jurisdiction to conduct de facto appellate review of decisions previously made by state courts. In recent years, however, the federal courts of appeals have become divided over the relationship between the jurisdictional *Rooker-Feldman* doctrine and ordinary preclusion principles. Although most circuits have preserved the doctrine in its original form, the Second and Third Circuits have transformed the doctrine into a limitless, preclusion-based doctrine that eviscerates dual federal and state jurisdiction and the congressional mandate that federal courts defer to state preclusion law.

The Third Circuit determined, *sua sponte*, that *Rooker-Feldman* required dismissal of ExxonMobil's federal-court claims for want of jurisdiction simply because those claims were identical to claims in an action pending on appeal in the Delaware Supreme Court. That decision erroneously conflates the scope of *Rooker-Feldman* with that of res judicata and conflicts not only with the Court's holding in *Feldman* itself, which establishes that *Rooker-Feldman* and res judicata are not coextensive, but also with the application of the doctrine by other courts of appeals that distinguish *Rooker-Feldman* from res judicata. The Third Circuit's approach is consistent with that of the Second Circuit, which has also erroneously found *Rooker-Feldman* and res judicata to be coextensive, but that formulation directly conflicts with rulings by the Fourth, Sixth, Seventh, and Ninth Circuits, which reject the application of *Rooker-Feldman* to bar parallel adjudication of claims in federal court simply because identical claims are brought in state court.

The Third Circuit's formulation of *Rooker-Feldman* reflects a deepening disagreement among the circuits about the relationship between *Rooker-Feldman*'s nonwaivable jurisdictional bar and the affirmative defense of res judicata. Once a narrow but strict doctrine that prevented federal appellate review of state-court decisions (except in this Court), the use of *Rooker-Feldman* has substantially expanded in recent years as some lower courts, and particularly the Second and Third Circuits, have been increasingly willing to infuse ordinary preclusion doctrines into the *Rooker-Feldman* analysis. The Third Circuit's approach rewards procedural gamesmanship and forum shopping and, if adopted, would eviscerate the congressionally crafted structure of parallel jurisdiction and respect for state preclusion law.

CITATION OF OPINIONS AND ORDERS

The court of appeals's opinion, App. 1a, is reported at 364 F.3d 102 (CA3 2004). The opinion of the district court, App. 11a, is reported at 194 F.Supp.2d 378 (D.N.J. 2002).

BASIS FOR JURISDICTION

The Third Circuit delivered its judgment and opinion on March 24, 2004. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254.

STATUTES INVOLVED

28 U.S.C. §1257 provides:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

28 U.S.C. §1738 provides:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the

United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

ExxonMobil's action against SABIC arises from SABIC's conduct with regard to two joint ventures formed between SABIC and subsidiaries of ExxonMobil twenty-four years ago. In 1980, SABIC and Mobil Yanbu Petrochemical Co. (Yanbu) formed a 50/50 joint venture, Yanbu Petrochemical Co., or Yanpet. App. 13a. In the same year, SABIC and Exxon Chemical Arabia, Inc. (ECAI) also formed a 50/50 partnership, Al-Jubail Petrochemical Co., or Kemya. App. 12a-13a. ExxonMobil has asserted, and a Delaware trial court found, that an overarching principle of the governing joint venture agreements was that the partners were not to profit at the joint ventures' expense. *See* App. 3a-4a, 17a. Specifically, one provision common to both joint venture agreements required that any technology procured by a partner for the joint ventures was to be passed through to the joint ventures at the partner's cost. *See* App. 16a, 83a. Nevertheless, when SABIC procured rights to the Unipol® process, a polyethylene manufacturing method, from Union Carbide Corporation, it secretly added a substantial mark-up to the sublicense fees it then charged to both Yanpet and Kemya. *See* App. 3a, 16a. In 2000, ExxonMobil discovered the mark-up for the first time.

In October 1998, SABIC first invoked the jurisdiction of the United States District Court for the District of New Jersey by filing a suit (NJ-I) against ExxonMobil claiming that Kemya was entitled to ownership of a certain patent related to the manufacture of polyethylene. After learning of the Unipol® overcharges, ExxonMobil asserted, among other defenses, affirmative defenses based on those overcharges including "unclean hands" and setoff. App. 12a. In July 2000, one day after a failed mediation in NJ-I between the parties, SABIC filed suit against Yanbu and ECAI in Delaware state court seeking a declaratory judgment that its overcharging for the Unipol® sublicenses did not give rise to any liability. App. 3a, 83a.[1] ExxonMobil later filed an action (NJ-II) against SABIC in the New Jersey federal district court seeking damages on the ground that SABIC's overcharges violated the joint venture agreements. App. 3a, 16a. NJ-I and NJ-II were consolidated. App. 12a, 80a.

Yanbu and ECAI also asserted counterclaims in the Delaware Superior Court for damages in tort and contract for SABIC's conduct in overcharging the joint ventures. App. 3a, 84a. After a two-week trial in March 2003, a Delaware jury returned a verdict finding, among other things, that SABIC had overcharged the joint ventures in violation of the joint venture agreements and that SABIC had committed the Saudi-law tort of *ghasb* (usurpation), entitling ExxonMobil to compensatory damages that included the overcharges and actual profits generated from those overcharges. *See* App. 4a. The jury awarded, and the Delaware Superior Court entered judgment for, more than $416 million in damages to ExxonMobil. App. 4a. SABIC has appealed the verdict, and the appeal is now pending in the Delaware Supreme Court.

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[1] The court of appeals erroneously stated that SABIC's Delaware action was filed in September 2000. App. 3a.

In the federal district court, SABIC moved for dismissal of NJ-II under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1602 *et seq.* App. 44a. Notably, SABIC never raised *Rooker-Feldman* as a basis for dismissal. The district court denied SABIC's motion, App. 57a, and SABIC filed an interlocutory appeal to the Third Circuit. App. 3a. Concurrent with its appeal brief, ExxonMobil moved the Third Circuit to stay the federal appeal pending the outcome of the Delaware posttrial and appellate proceedings, and the court granted the stay. On November 12, 2003, although the Delaware proceedings were still pending, the court granted SABIC's motion to lift the stay and set the case for argument and submission. In deciding the appeal, the Third Circuit did not reach the FSIA question because of its conclusion that the *Rooker-Feldman* doctrine, which the court first raised on its own initiative the day before oral argument, required dismissal of ExxonMobil's claims against SABIC in the federal action. App. 3a; *see also* App. 5a.

Although not directly purporting to equate *Rooker-Feldman* with preclusion, the court of appeals apparently premised its application of *Rooker-Feldman* on its finding "that ExxonMobil's claims are identical to the claims upon which the Delaware Superior Court reached a final judgment." App. 6a. The court failed to explain how *Rooker-Feldman*—which proscribes de facto federal appellate jurisdiction over state-court decisions previously made—could apply in this case when (1) ExxonMobil does not challenge the only state-court decision already made, which was decided in ExxonMobil's favor; (2) the only state-court decision that ExxonMobil might theoretically attempt to attack (*i.e.*, the Delaware appellate decision) is still pending; and (3) federal courts have subject matter jurisdiction over

many claims that may nevertheless be barred by the non-jurisdictional affirmative defense of preclusion.[2]

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve a conflict among the courts of appeals regarding the relationship of the jurisdictional *Rooker-Feldman* doctrine to res judicata principles. The Third Circuit's expansion of *Rooker-Feldman* eviscerates the well-established principle that concurrent jurisdiction may permit overlapping and even identical claims to proceed in parallel in state and federal courts as long as the claims asserted in the federal action do not challenge the result of the state-court action.

When parallel claims are pending in state court, a federal court may stay federal proceedings pending resolution of the state action while continuing to exercise subject matter jurisdiction. When res judicata applies but *Rooker-Feldman* does not, the federal district court has subject matter jurisdiction to entertain the claims and may dismiss them only if the defendant has asserted the affirmative defense of preclusion, and then only in conformance with the preclusion law of the relevant State under the Full Faith and Credit Act, 28 U.S.C. §1738. If, however, as the Third Circuit effectively held, *Rooker-Feldman* encompasses all claims that would ordinarily fall within the scope of res judicata, *Rooker-Feldman* replaces that waivable affirmative defense with a nonwaivable jurisdictional bar that trumps federal jurisdiction that otherwise exists and that a federal court may invoke *sua*

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[2] Even an adverse decision by the Delaware Supreme Court would not necessarily bar relitigation of ExxonMobil's claims under applicable preclusion principles. For example, as SABIC conceded in the Delaware Supreme Court, a reversal based on the Delaware statute of limitations—the primary argument SABIC has asserted on appeal—would not likely preclude ExxonMobil from litigating its substantive claims in another forum. *See* SABIC Reply, Case No. 493, 2003 in the Delaware Supreme Court at 6.

sponte, as the Third Circuit did, to evade exercising the jurisdiction it otherwise possesses. Application of the Third Circuit's formulation of *Rooker-Feldman* when the relevant state proceeding is still pending would mean that parallel litigation can never proceed in state and federal courts.

The Third Circuit's approach directly conflicts with the application of *Rooker-Feldman* by the Fourth, Sixth, Seventh, and Ninth Circuits, which all recognize that preclusion, abstention, and comity doctrines reconcile the inconsistencies that parallel jurisdiction could otherwise generate. Moreover, the Third Circuit's version of *Rooker-Feldman* upsets the congressionally crafted jurisdictional scheme by divesting the federal district courts of jurisdiction that otherwise exists to adjudicate claims over which state courts may also have jurisdiction. That approach rewards gamesmanship and promotes forum shopping. The conflicting authority that has arisen in numerous courts of appeals cases decided since the Court issued *Feldman* over two decades ago demonstrates that, without the Court's guidance, the conflict will continue to deepen and, given the Third Circuit's entrenched position on the subject, the conflict is unlikely to resolve itself without the Court's assistance.

I. THE COURT SHOULD STEM THE GROWING CONFLICT REGARDING THE LIMITS OF THE *ROOKER-FELDMAN* DOCTRINE.

The *Rooker-Feldman* doctrine derives from two cases the Court decided sixty years apart, *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). The essence of the doctrine is that federal district courts "do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings." *Feldman*, 460 U.S., at 486. The Court has never, outside of *Rooker* and *Feldman* themselves, employed the doctrine to hold that a federal district court is without subject matter jurisdiction.

Despite the Court's limited use of the doctrine, "since the *Feldman* decision in 1983, the lower federal courts have come to invoke *Rooker-Feldman*—often to find no jurisdiction—with notable frequency." Thomas D. Rowe, Jr., Rooker-Feldman: *Worth Only the Powder to Blow It Up?*, 74 NOTRE DAME L. REV. 1081, 1083 (1999). That growth has, however, given rise to conflicts over the relationship between *Rooker-Feldman* and preclusion principles. *See Noel* v. *Hall*, 341 F.3d 1148, 1162-63 (CA9 2003) (collecting cases expressing confusion about *Rooker-Feldman* and preclusion). The essential conflict is keenly illustrated by the Third Circuit's holding in this case, which transmuted *Rooker-Feldman* into a doctrine that encompasses all claims that may fall within the scope of ordinary preclusion principles and then applied it to prevent a federal court from exercising jurisdiction over matters that have not yet been finally adjudicated in the relevant state court. The Court should speak again to *Rooker-Feldman*, confine the doctrine to its proper and useful application of containing federal jurisdiction to its congressionally mandated limits, and preserve the federal courts' ability and duty to exercise their jurisdiction fully within those limits.

A. *Rooker-Feldman* Developed As a Doctrine to Prevent De Facto Federal Appellate Review of State Court Decisions.

The plaintiff in *Rooker* brought a bill in equity in federal district court seeking to have a judgment of an Indiana court, which was affirmed by the Indiana Supreme Court, "declared null and void, and to obtain other relief dependent on that outcome." 263 U.S., at 414. The plaintiff argued that the state court judgment violated the Contract Clause of the United States Constitution as well as due process and equal protection. *Id.*, at 414-15. The Court held that it "would be an exercise of appellate jurisdiction" for the federal district court to review the state court judgment. *Id.*, at 416.

The federal district court did not have jurisdiction to perform that review because §237 of the Judicial Code (now 28 U.S.C. §1257) conferred jurisdiction to review state court judgments only on this Court, while "[t]he jurisdiction possessed by the District Courts is strictly original." *Id.* Moreover, the state courts had "the province and duty" to decide any constitutional questions raised by the application of the state statute at issue. *Id.*, at 415. *Rooker* thus established the principle—derived from statute, not constitutional command—that a party cannot appeal a state court judgment in a federal district court, and the recourse for an adverse decision in a state court is an appeal to the state appellate courts, with the possibility of ultimate review by this Court. *See, e.g., Parkview Assocs. P'ship* v. *City of Lebanon*, 225 F.3d 321, 324 (CA3 2000); *accord Noel*, 341 F.3d, at 1156 ("Reduced to its essence, *Rooker* held that when a losing plaintiff in state court brings a suit in federal district court asserting as legal wrongs the allegedly erroneous legal rulings of the state court and seeks to vacate or set aside the judgment of that court, the federal suit is a forbidden de facto appeal.").

The two plaintiffs in *Feldman* had each petitioned the District of Columbia Court of Appeals (which has the same status as a state supreme court, 28 U.S.C. §1257(b)) to waive a requirement that candidates sitting for the D.C. bar exam be graduates of approved law schools. 460 U.S., at 465-69, 471-72. The D.C. Court of Appeals denied both petitions. Plaintiffs filed (separate) suits in the United States district court, each alleging that the D.C. court's denial of their waiver petitions violated federal constitutional and statutory rights. *Id.*, at 469, 472-73. The district court dismissed those claims for lack of jurisdiction, and the U.S. Court of Appeals for the District of Columbia reversed, holding that the waiver proceedings in the D.C. court were not really "judicial" and, thus, the federal district court cases did not seek appellate review of a final judgment of a state court. *Id.*, at 474.

The Court reversed, holding that the waiver proceedings were "judicial," and thus fell under the jurisdictional bar articulated in *Rooker*. *Id.*, at 482. The plaintiffs' constitutional claims arising from the denial of their particular applications were "inextricably intertwined" with their complaint that the D.C. court erred in denying their particular applications for admission, so the district court did not have jurisdiction over those elements of plaintiffs' complaints. *Id.*, at 486-88.

Plaintiffs' remaining allegations, however, which raised general constitutional attacks on the bar admission rule, were within the jurisdiction of the federal district court because those allegations did not require review of a judicial decision in a particular case. *Id.* However, the Court noted, those claims might be barred by res judicata. *Id.*, at 487-88 & n.19.

Although *Rooker* itself presented a direct attack on a state court judgment, *Feldman* further articulated the test for whether a claim that a state court has violated federal rights is a de facto attack on a previous state court ruling: "If the constitutional claims . . . are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application [for relief], then the District Court is in essence being called upon to review the state court decision. This the District Court may not do." *Id.*, at 483 n.16.

In the two decades since *Feldman*, the Court has addressed the *Rooker-Feldman* doctrine in only a handful of cases, and then only briefly. *See Verizon Md.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002) (noting that *Rooker-Feldman* "has no application to judicial review of executive action, including determinations made by a state administrative agency"); *Johnson* v. *De Grandy*, 512 U.S. 997, 1005-06 (1994) (describing "this Court's *Rooker/Feldman* abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on

the losing party's claim that the state judgment itself violates the loser's federal rights"); *Howlett* v. *Rose*, 496 U.S. 356, 370 (1990) (describing *Rooker-Feldman* as "the rule that a federal district court cannot entertain an original action alleging that a state court violated the Constitution by giving effect to an unconstitutional state statute"); *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 622-23 (1989) (observing that the appeal from the Arizona Supreme Court would have been barred by *Rooker-Feldman* if it had instead been brought originally in a federal suit); *Pennzoil Co.* v. *Texaco*, 481 U.S. 1, 7, 10 (1987) (requiring abstention under *Younger* v. *Harris*, 401 U.S. 37 (1971), instead of applying *Rooker-Feldman*, in §1983 challenge to ongoing state civil proceedings).

B. The Courts of Appeals Are in Conflict Over the Reach of the *Rooker-Feldman* Doctrine.

"Since *Feldman*, the Supreme Court has provided [the lower courts] with little guidance . . . . The result has been inconsistency in the lower federal courts faced with challenges based upon the *Rooker-Feldman* doctrine." *Moccio* v. *N.Y. State Office of Court Admin.*, 95 F.3d 195, 198 (CA2 1996) (internal citation omitted).

Almost from the doctrine's inception in *Rooker*, the courts of appeals have often confused it with res judicata. *See, e.g.*, *Ellentuck* v. *Klein*, 570 F.2d 414, 425 (CA2 1978); *Hutcherson* v. *Lehtin*, 485 F.2d 567, 569 (CA9 1973); *Roy* v. *Jones*, 484 F.2d 96, 99 n.11 (CA3 1973); *Hanley* v. *Four Corners Vacation Props., Inc.*, 480 F.2d 536, 538 (CA10 1973); *Bricker* v. *Crane*, 468 F.2d 1228, 1231-32 (CA1 1972); *Brown* v. *Chastain*, 416 F.2d 1012, 1021 (CA5 1969) (Rives, J., dissenting); *Norwood* v. *Parenteau*, 228 F.2d 148, 150 (CA8 1955). Despite the Court's holding in *Feldman* that certain claims that might be barred by res judicata were nevertheless not barred by the jurisdictional *Rooker-Feldman* doctrine, *Feldman*, 460 U.S., at 487-88 & n.19, some courts

of appeals have continued to conflate *Rooker-Feldman* with preclusion, *see, e.g.*, *Cruz* v. *Melecio*, 204 F.3d 14, 21 n.5 (CA1 2000) ("Only a state court adjudication that itself has preclusive effect can bring the *Rooker-Feldman* doctrine into play."); *Doctor's Assocs.* v. *Distajo*, 107 F.3d 126, 137 (CA2 1997) ("[T]he *Rooker-Feldman* doctrine 'at a minimum' is coextensive with preclusion principles." (quoting *Moccio*, 95 F.3d, at 199-200)), while other circuits take more care to distinguish the two doctrines. *See, e.g.*, *Ingalls* v. *Erlewine* (*In re Erlewine*), 349 F.3d 205, 210 n.4 (CA5 2003) ("Our analysis here should not be taken to imply that the *Rooker-Feldman* doctrine is simply coextensive with traditional preclusion doctrine." (citing 18B CHARLES ALAN WRIGHT, *ET AL.*, FEDERAL PRACTICE & PROCEDURE §4469.1 (2d ed. 2002) (describing the subtle differences between the two bodies of law)); *Hutcherson* v. *Lauderdale County*, 326 F.3d 747, 755 (CA6 2003) ("The two doctrines 'are not coextensive.'"); *Kenmen Eng'g* v. *City of Union*, 314 F.3d 468, 476 (CA10 2002) ("Rather than prohibiting the relitigation of issues and claims (the province of the preclusion doctrines), *Rooker-Feldman* protects state-court judgments from impermissible appellate review by lower federal courts."); *see also* *Kamilewicz* v. *Bank of Boston Corp.*, 100 F.3d 1348, 1350 (CA7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) ("[A] judgment that is not entitled to full faith and credit does not acquire extra force via the *Rooker-Feldman* doctrine.").

The Ninth Circuit recently undertook a detailed examination of the subtle and important distinctions between *Rooker-Feldman* and the principle of interjurisdictional preclusion codified in 28 U.S.C. §1738. According to that circuit, "[a]s repeatedly construed by the Supreme Court, in decisions both before and after *Feldman*, § 1738 requires a federal district court to give the same—not more and not less—preclusive effect to a state court judgment as that judgment would have in the state courts of the state in which

it was rendered." *Noel*, 341 F.3d, at 1160 (citing *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 369 (1996); *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 523 (1986); *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82-85 (1984); *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982), and *Allen* v. *McCurry*, 449 U.S. 90, 96 (1980)). "The Supreme Court has never construed the *Rooker-Feldman* doctrine to give greater preclusive effect to a state court judgment in federal court than the judgment would have under § 1738. Indeed, such a construction of *Rooker-Feldman* would directly conflict with § 1738 as that statute has been construed by the Court." *Id.*, at 1160-61. Therefore, the court held that *Rooker-Feldman* did not apply to prevent Noel from pursuing identical claims simultaneously in federal and pending state proceedings. *Id.*, at 1165. To apply *Rooker-Feldman* broadly enough to bar Noel's federal suit would have "conflict[ed] with either the rule permitting parallel state and federal litigation or the rule of § 1738 requiring federal courts to follow state preclusion rules." *Id.*, at 1161.

Noel's reasoning was based in part on the formulation of *Rooker-Feldman* that has evolved in the Seventh Circuit over the past decade. *See id.*, at 1164. *GASH Assocs.* v. *Vill. of Rosemont*, 995 F.2d 726 (CA7 1993), explained:

> "The *Rooker-Feldman* doctrine . . . has nothing to do with § 1738. It rests on the principle that district courts have only original jurisdiction. . . . The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Id.*, at 728.

Since *GASH*, the Seventh Circuit has applied its approach to *Rooker-Feldman* numerous times. *See, e.g., Lewis* v. *Anderson*, 308 F.3d 768, 772 (CA7 2002); *Jensen* v. *Foley*, 295 F.3d 745, 747-48 (CA7 2002); *Durgins* v. *City of E. St. Louis*, 272 F.3d 841, 844 (CA7 2001); *Rizzo* v. *Sheahan*, 266 F.3d 705, 714 (CA7 2001); *Centres, Inc.* v. *Town of Brookfield*, 148 F.3d 699, 702 (CA7 1998); *Young* v. *Murphy*, 90 F.3d 1225, 1231 (CA7 1996); *Garry* v. *Geils*, 82 F.3d 1362, 1366-67 (CA7 1996). Like the Ninth Circuit, the Sixth Circuit recently approved the Seventh Circuit's approach to distinguishing *Rooker-Feldman* from res judicata. *Stemler* v. *Florence*, 350 F.3d 578, 589 (CA6 2003); *Hutcherson*, 326 F.3d, at 755-56. The Seventh Circuit's distinction of *Rooker-Feldman* from res judicata has important practical consequences because, among other things, "[w]hile *Rooker-Feldman* is entirely federal and requires no reference to principles of state law, under res judicata we look to the law of the state" to determine preclusive effect, and "under res judicata we must determine whether the party against whom the defense is raised had a full and fair opportunity to pursue its claim in the previous state proceeding." *Garry*, 82 F.3d, at 1367 n.8.

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910). The distinction drawn by the Sixth, Seventh, and Ninth Circuits between *Rooker-Feldman* and res judicata alleviates any potential tension between *Rooker-Feldman* and that rule. *See Noel*, 341 F.3d, at 1159 (noting the tension and that "the rule that overlapping or even identical federal and state court litigation may proceed simultaneously[is] limited only by doctrines of abstention and comity"); *Vulcan Chem. Techs., Inc.* v. *Barker*, 297 F.3d 332, 340 (CA4 2002) ("It is true, as a general rule, that our dual system of federal and state governments allows parallel actions to proceed to judgment

until one becomes preclusive of the other."); *cf. Pennzoil*, 481 U.S., at 12 n.9 (abstention doctrines are "designed to soften the tensions inherent in a system that contemplates parallel judicial processes"). In accord with the Sixth, Seventh, and Ninth Circuits, and with the other courts of appeals that have distinguished *Rooker-Feldman* from preclusion, *see Ingalls*, 349 F.3d, at 210 n.4; *Kenmen*, 314 F.3d, at 476, the Fourth Circuit has explained that "[i]t would be a novel application of the already beleaguered *Rooker-Feldman* doctrine to divest a federal court of subject matter jurisdiction simply because a parallel case was later filed in State court seeking to decide the same question." *Vulcan*, 297 F.3d, at 338 n.2.

In conflict with those circuits that have distinguished *Rooker-Feldman* from res judicata, the Second Circuit erroneously holds that the doctrines are at least coextensive. *Doctor's Assocs.*, 107 F.3d, at 137; *Moccio*, 95 F.3d, at 199-200.[3] That error led the Second Circuit to conclude "[i]f the precise claims raised in a state court proceeding are raised in the subsequent federal proceeding, *Rooker-Feldman* plainly will bar the action." *Moccio*, 95 F.3d, at 198-99. That formulation directly conflicts with the Court's holding in *Feldman* itself that certain claims that may be barred by the affirmative defense of res judicata under state-law preclusion principles are plainly not jurisdictionally barred by *Rooker-Feldman*. *See Feldman*, 460 U.S., at 487-88 & n.19. Moreover, and in particular, the Second Circuit's approach directly conflicts with the Sixth, Seventh, and Ninth Circuits' express holdings that *Rooker-Feldman* applies only when "the injury of which [the federal plaintiff] complains was caused *by* the [state-court] judgment" itself rather than an out-of-court injury that the state court failed to remedy. *GASH*, 995 F.2d, at 729; *see Noel*, 341 F.3d, at 1164-65 (quoting

[3] The First Circuit also appears to equate *Rooker-Feldman* and preclusion, although it has not done so as explicitly as the Second Circuit. *See Cruz*, 204 F.3d, at 21 n.5.

GASH with approval); *Hutcherson*, 326 F.3d, at 755-56 (adopting the Seventh Circuit's approach). In the Sixth, Seventh, and Ninth Circuits, *Rooker-Feldman* does not "plainly" bar every action that would be "plainly" barred in the Second Circuit.

By distinguishing *Rooker-Feldman* from preclusion, although not as concretely as the Sixth, Seventh, and Ninth Circuits have done, the Fourth and Fifth Circuits have also rejected the Second Circuit's simple equation of the two doctrines. *See Ingalls*, 349 F.3d, at 210 n.4 (distinguishing *Rooker-Feldman* from res judicata); *Vulcan*, 297 F.3d, at 338 (discussing *Rooker-Feldman* and interjurisdictional preclusion). The Tenth Circuit, however, which previously made a careful distinction between *Rooker-Feldman* and preclusion, *see Kenmen*, 314 F.3d, at 476, recently explained that "we apply the *Rooker-Feldman* doctrine in a slightly broader fashion" than those circuits in which "the *Rooker-Feldman* doctrine is coextensive with preclusion doctrine." *Merrill Lynch Bus. Fin. Servs., Inc.* v. *Nudell*, 363 F.3d 1072, 1075 (CA10 2004) (distinguishing the Tenth Circuit's view from, *inter alia*, the Second Circuit's view in *Moccio*).

C. The Third Circuit's Erroneous and Conflicting Application of *Rooker-Feldman*.

In this case, the Third Circuit placed itself on the wrong side of the split among the circuits by falling into the same error as the Second Circuit, although stating its application of *Rooker-Feldman* in different (and inaccurate) terms. Like the Second Circuit, the Third Circuit found that the jurisdictional *Rooker-Feldman* doctrine applies simply because federal and state actions involve identical claims. Moreover, the Third Circuit went a step further by embracing the precise "novel application" of *Rooker-Feldman* the Fourth Circuit warned against in *Vulcan*—the Third Circuit divested the federal district court of subject matter jurisdiction in this case merely

because a parallel case was pending in state court seeking to decide the same questions. *See Vulcan*, 297 F.3d, at 338 n.2.

Importantly, it is not the fact that the Delaware trial court's decision is pending on appeal in Delaware that makes the Third Circuit's application of *Rooker-Feldman* wrong. *Rooker-Feldman* is appropriately—perhaps especially—applicable to bar federal challenges to decisions by state trial courts that are de facto attempts to circumvent available state appellate review. *See, e.g., Feldman*, 460 U.S., at 483 n.16 ("[L]ower federal courts possess no power whatever to sit in direct review of state court decisions."); *Brown & Root, Inc.* v. *Breckenridge*, 211 F.3d 194, 198-99 (CA4 2000). In this case, ExxonMobil, the federal plaintiff, is not challenging the Delaware trial court's decision because it prevailed in the trial proceeding. But the Third Circuit aggressively applied *Rooker-Feldman* to dismiss ExxonMobil's claims merely because (1) the state case presents the same issues as the federal case and (2) the pending state appeal might result in a future decision regarding those issues that ExxonMobil might attempt to challenge.

Rather than asking, as most circuits would, whether ExxonMobil complained of an injury distinct from its claims against SABIC—that is, an injury caused by the state-court judgment itself—the Third Circuit applied *Rooker-Feldman* merely because ExxonMobil's claims based on SABIC's overcharging of the joint ventures are identical in the federal and Delaware actions. App. 6a. Properly applied, *Rooker-Feldman* bars "a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court, *based on the losing party's claim that the state judgment itself violates the loser's federal rights*." *Johnson*, 512 U.S., at 1005-06 (emphasis added). ExxonMobil's claims sound in tort and contract under Saudi law; they do not raise any questions about ExxonMobil's substantive federal rights. Most important to

the *Rooker-Feldman* inquiry, ExxonMobil—the claimant in both the federal and state suits—does not contend that any state-court judgment has caused its injuries. *Cf., e.g., Garry*, 82 F.3d, at 1365-66 ("If the injury alleged is distinct from that judgment, i.e., the party maintains an injury apart from the loss in state court and not 'inextricably intertwined' with the state judgment, . . . res judicata may apply, but *Rooker-Feldman* does not."). Indeed, the only state-court judgment that has been made is the judgment in ExxonMobil's favor, which, unsurprisingly, ExxonMobil has not sought to overturn.

Initially failing to acknowledge that ExxonMobil's position in the federal suit is in full agreement with the favorable judgment of the state trial court, the court of appeals, purporting to take "a narrow view of the *Rooker-Feldman* doctrine," found that this case "presents the 'paradigm situation in which *Rooker-Feldman* precludes a federal district court from proceeding.'" App. 6a (quoting *E.B.* v. *Verniero*, 119 F.3d 1077, 1090-91 (CA3 1997), which the court of appeals characterized as "describing a case in which the federal court plaintiff sought an injunction directing that a state court order not be carried out"). In contrast to the "paradigm situation" the court of appeals described, it should have been apparent that ExxonMobil's overriding interest is in having the previously made state-court judgment in its favor carried out. Similarly to the Second Circuit's flawed reasoning that any claim that might be barred by res judicata is also jurisdictionally barred by *Rooker-Feldman*, the court of appeals found the fact that ExxonMobil's claims had already been "actually litigated" in the state trial proceeding sufficient to invoke *Rooker-Feldman*. App. 8a; *compare Moccio*, 95 F.3d, at 198-99 ("If the precise claims raised in a state court proceeding are raised in the subsequent federal proceeding, *Rooker-Feldman* plainly will bar the action."), *with* App. 8a ("Because ExxonMobil's federal claims were identical to the claims in which the Delaware Superior Court reached

a final judgment, they are barred by the *Rooker-Feldman* doctrine.").[4]

In essence, the court of appeals divested the district court of jurisdiction for no reason other than the prior adjudication of identical claims in the Delaware trial court, despite the fact that ExxonMobil's federal suit does not assert any injury caused by the state judgment itself, does not challenge the only state judgment that has been entered, and would not challenge any adverse decision by the Delaware Supreme Court based on SABIC's nonsubstantive appellate arguments. The court of appeals ultimately predicated its application of *Rooker-Feldman* on the potential future decision of the Delaware Supreme Court in SABIC's pending appeal—if that court overturns the Delaware trial court. App. 8a. In other words, the real effect of the court of appeals's holding is to apply *Rooker-Feldman* preemptively to divest the federal district court of jurisdiction because ExxonMobil might, in the future, attempt to attack a decision that the Delaware Supreme Court might or might not make in the future regarding claims identical to those in the federal action.

II. THE COURT SHOULD REJECT THE THIRD CIRCUIT'S EXPANSION OF *ROOKER-FELDMAN*.

The Court should grant this petition and disapprove the Third Circuit's expansive redefinition of *Rooker-Feldman*, which lacks any limiting principle that would preserve the congressionally mandated jurisdictional structure and defer-

[4] Indeed, although the court of appeals did not address state preclusion law, its *Rooker-Feldman* formulation closely mirrors elements of Delaware res judicata law. *See E.B.R. Corp.* v. *PSL Air Lease Corp.*, 313 A.2d 893, 894 (Del. 1973) ("Under Delaware law a judgment in one cause of action is conclusive in a subsequent and different cause of action as to a question of fact actually litigated by the parties and determined in the first action.").

ence to state preclusion law. If applied consistently, the Third Circuit's rationale would eviscerate dual federal and state jurisdiction.

The court of appeals's reasoning provides no limiting principle that would have prevented, for example, the district court in this case from applying *Rooker-Feldman* to dismiss ExxonMobil's claims even before the Delaware trial court rendered a judgment simply because those claims might be inconsistent with the judgment the Delaware trial court might render. The court of appeals found that ExxonMobil's claims fell within the scope of *Rooker-Feldman*'s nonwaivable jurisdictional bar simply because they raise issues identical to issues in the parallel state litigation, not because ExxonMobil contends that any state-court judgment violated its federal rights. *Compare Doctor's Assocs.*, 107 F.3d, at 137 (stating the Second Circuit's belief that *Rooker-Feldman* is coextensive with preclusion "at a minimum"), *with Garry*, 82 F.3d, at 1366 (expressing the Seventh Circuit's belief that *Rooker-Feldman*, as opposed to preclusion, applies only when the federal plaintiff alleges an independent injury caused by a state-court judgment).

ExxonMobil's claims that are now barred in the federal district courts within the Third Circuit would not, assuming personal jurisdiction existed, be barred in most other circuits. *Rooker-Feldman* does not prevent a party from pursuing claims in federal court simultaneously with pursuing identical claims in a pending state proceeding, *see Noel*, 341 F.3d, at 1165, although abstention doctrine would likely counsel the federal court to hold the case in abeyance pending an expected state-court appellate judgment. *See id.*, at 1159.

The Sixth and Seventh Circuits do not apply *Rooker-Feldman* when "the injury alleged is distinct from [the state-court] judgment." *Garry*, 82 F.3d, at 1365; *see also Hood* v. *Keller*, 341 F.3d 593, 598-99 (CA6 2003); *Nelson* v. *Murphy*, 44 F.3d 497, 503 (CA7 1995) (holding that the plaintiffs

avoided *Rooker-Feldman* because they challenged the lawfulness of an act independently of a state court's approval of that act). Most circuits would not apply *Rooker-Feldman* in this case because ExxonMobil's claims, as asserted in the district court, were brought to redress injuries caused by SABIC, not by a Delaware court.

In *American Reliable Insurance Co.* v. *Stillwell*, 336 F.3d 311 (CA4 2003), the Fourth Circuit explained that *Rooker-Feldman* applies to interlocutory state-court orders and that "[i]t is sufficient that a state court render a decision resolving an issue that is the basis for the federal action." *Id.*, at 320. In this case, the relevant state court—the Delaware Supreme Court—has not yet rendered a decision that would be sufficient to invoke *Rooker-Feldman* in the Fourth Circuit. In *Vulcan*, the Fourth Circuit did not reach the *Rooker-Feldman* issue because it affirmed the district court's abstention under *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), but explained that it would be inappropriate to apply *Rooker-Feldman* to divest a federal district court of jurisdiction simply because a parallel state case seeks to decide the same question, *Vulcan*, 297 F.3d, at 338 n.2, as the Third Circuit has done in this case by applying *Rooker-Feldman* while the relevant state-court proceedings are still pending.

Because it renders parallel federal and state jurisdiction a nullity and circumvents state preclusion law, the Third Circuit's reformulation of *Rooker-Feldman* promotes gamesmanship and forum shopping. A defendant who is sued in federal district court in the Third Circuit—or any circuit that adopts the Third Circuit's *Rooker-Feldman* approach—can now defeat federal jurisdiction simply by filing a suit (*e.g.*, a declaratory judgment action) raising identical issues in state court.[5] A defendant who remains in a federal court that

[5] Indeed, the Delaware trial court concluded that SABIC "engaged in preemptive forum shopping." App. 86a ("Clearly, SABIC did win the race to the Courthouse, and, in doing so, selected the forum in which it desired to have the overcharge issue decided. It is also clear, based on SABIC's actions, that it did not want the New Jersey District Court to decide the overcharge issue." (footnotes omitted)).

follows the Third Circuit's approach can delay raising, or utterly fail to raise, any available affirmative defense of res judicata arising from a related state-court action and rely on the nonwaivable jurisdictional bar of *Rooker-Feldman* to preclude the federal action, even if the state-court decision would not be given preclusive effect under the State's own preclusion law. The Court should restore consistency regarding federal jurisdiction and the application of preclusion law by the federal courts by rejecting the Third Circuit's approach to *Rooker-Feldman*.

CONCLUSION

The Court should grant the petition for writ of certiorari, reverse the court of appeals's judgment, and order Exxon Mobil's claims to be reinstated.

Respectfully submitted,

ANDREW S. POLLIS
DAVID J. MICHALSKI
HAHN LOESER & PARKS LLP
3300 BP Tower
200 Public Square
Cleveland, Ohio 44114
(216) 621-0150

ELIZABETH J. SHER
PITNEY, HARDIN, KIPP & SZUCH LLP
200 Campus Drive
Florham Park, New Jersey 07932
(973) 966-6300

*Counsel of Record

JAMES W. QUINN
DAVID LENDER
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

GREGORY S. COLEMAN *
CHRISTIAN J. WARD
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioners

APPENDICES

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2130

EXXON MOBIL CORPORATION; EXXONCHEMICAL ARABIA, INC.; MOBIL YANBU PETROCHEMICAL COMPANY, INC.

v.

SAUDI BASIC INDUSTRIES CORPORATION
Appellant

On Appeal from the United States District Court
for the District of New Jersey D.C.
Civil Action No. 00-cv-03841
(Honorable William H. Walls)

Argued December 9, 2003

Before: AMBRO, FUENTES and CHERTOFF, Circuit Judges

(Filed March 24, 2004)

Gregory A. Castanias, Esq. (Argued)
William K. Shirey II, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

Kenneth R. Adamo, Esq.
Michael W. Vary, Esq.
Leozino Agozzino, Esq.
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114

Attorneys for Appellant

Elizabeth J. Sher, Esq.
Pitney, Hardin, Kipp & Szuch
P.O. Box 1945
Morristown, NJ 07962

James W. Quinn, Esq. (Argued)
David J. Lender, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue, 27th Floor
New York, NY 10153

Andrew S. Pollis, Esq.
David J. Michalski, Esq.
Hahn, Loeser & Parks
3300 BP America Building
200 Public Square
Cleveland, OH 44114

K.C. Johnson, Esq.,
Exxon Mobil Corporation
800 Bell Street, Suite 1686J
Houston, TX 77002

Attorneys for Appellees

OPINION OF THE COURT

AMBRO, Circuit Judge

Saudi Basic Industries Corporation ("SABIC") appeals from the District Court's order denying its motion to dismiss, based on sovereign immunity, the claims of two Exxon Mobil subsidiaries, Mobil Yanbu Petrochemical Company ("Yanbu") and Exxon Chemical Arabia, Inc. ("ECAI"). We do not reach the foreign sovereign immunity question, however, because we determine that the *Rooker-Feldman* doctrine bars federal subject matter jurisdiction over the subsidiaries' claims, which have been already decided in state court.

I.

Facts and Procedural Posture

In 1980, SABIC and the Exxon (now ExxonMobil) subsidiaries formed two joint venture entities. One, called Yanpet, was the joint venture between SABIC and Yanbu, and another, called Kemya, was the joint venture between SABIC and ECAI. Two decades later, the parties began to dispute the propriety of royalties SABIC had charged to the joint venture entities for the sublicense to a polyethylene manufacturing method called the Unipol® process. In September 2000 SABIC sued Yanbu and ECAI in the Delaware Superior Court seeking a declaratory judgment that these royalty charges did not violate the joint venture agreements with Yanbu and ECAI. Later that same month ExxonMobil, Yanbu, and ECAI countersued SABIC in the United States District Court for the District of New Jersey (Civil Action No. 00-3841), seeking the converse declaratory judgment—that SABIC had overcharged the joint venture entities for the sublicense in violation of the joint venture agreements.

In January 2002, Yanbu and ECAI filed an answer to SABIC's state court complaint, asserting as counterclaims the same claims they had filed in their federal court complaint. In March 2003, after a two-week trial in the Delaware Superior Court, the jury returned a $416,880,764 verdict against SABIC in favor of ExxonMobil. SABIC has appealed the verdict, which is currently pending in the Delaware Supreme Court.

Prior to the state court trial, SABIC moved to dismiss ExxonMobil's federal court action, asserting foreign sovereign immunity. The District Court denied the motion on April 3, 2002. *Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F. Supp. 2d 378 (D.N.J. 2002). Though the order also addressed other issues in that action, SABIC appeals only from the sovereign immunity decision.

II.

Jurisdiction

A. Appellate Jurisdiction

We generally do not have jurisdiction to review interlocutory decisions such as the denial of a motion to dismiss. Under the collateral order doctrine,[1] however, we have recognized exceptions to this rule. One well-established exception is for orders denying motions to dismiss for reasons of immunity. *See, e.g., In re Montgomery County*, 215 F.3d at 373 (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). Thus,

[1] The collateral order doctrine excepts a "narrow range" of interlocutory decisions from the general rule that only final orders are appealable. *In re Montgomery County*, 215 F.3d 367, 373 (3d Cir. 2000) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949)). To be an appealable collateral order, it must "conclusively determine the disputed issue, the issue must be completely separate from the merits of the action, and the decision must be effectively unreviewable on appeal from a final judgment." *Id.* (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

we have appellate jurisdiction over the District Court's denial of SABIC's motion to dismiss based on sovereign immunity.

B. *Rooker-Feldman* Doctrine

Determining that appellate jurisdiction is proper in a case does not end our jurisdictional inquiry. We have a "continuing obligation to *sua sponte* raise the issue of subject matter jurisdiction when it is in question." *Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 420 (3d Cir. 2003) (citing *Bracken v. Matgouranis*, 296 F.3d 160, 162 (3d Cir. 2002)). We focused at oral argument on whether federal subject matter jurisdiction over this case fails under the *Rooker-Feldman* doctrine because ExxonMobil's claims have already been litigated in state court. Aided by post-argument letter briefs submitted by the parties, we conclude the answer is yes.

The *Rooker-Feldman* doctrine, derived from two Supreme Court cases—*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)—prevents lower federal courts from "sit[ting] in direct review of the decisions of a state tribunal." *Gulla v. North Strabane Twp.*, 146 F.3d 168, 171 (3d Cir. 1998). Because Congress has conferred jurisdiction to review a state court's decision only on the Supreme Court, *see* 28 U.S.C. § 1257, lower federal courts lack the power to decide claims in which "the relief requested . . . requires determining that the state court's decision is wrong or . . . void[ing] the state court's ruling." *Desi's Pizza*, 321 F.3d at 419 (quoting *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996)). As we recently explained, "a claim is barred by *Rooker-Feldman* under two circumstances: first, if the claim was 'actually litigated' in state court prior to the filing of the federal action or, second, if the claim is 'inextricably intertwined with [the] state adjudication.'" *Desi's Pizza*, 321 F.3d at 419 (quoting *Parkview Assocs. P'ship v. City of Lebanon*, 225 F.3d 321, 325 (3d Cir. 2000)).

The state level decision need not be of its highest court. The *Rooker-Feldman* doctrine applies equally to final decisions of lower state courts. *FOCUS*, 75 F.3d at 840.

Here there is no dispute that ExxonMobil's claims are identical to the claims upon which the Delaware Superior Court reached a final judgment. Thus, though our Court takes a narrow view of the *Rooker-Feldman* doctrine, *Parkview Assocs. P'ship*, 225 F.3d at 326, litigating ExxonMobil's claims to final judgment in state court presents the "paradigm situation in which *Rooker-Feldman* precludes a federal district court from proceeding." *E.B. v. Verniero*, 119 F.3d 1077, 1090-91 (3d Cir. 1997) (describing a case in which the federal court plaintiff sought an injunction directing that a state court order not be carried out).

ExxonMobil argues that the "actually litigated" circumstance does not trigger *Rooker-Feldman* because the March 2003 state court judgment was not reached prior to ExxonMobil's filing of the federal action in August 2000. It cites to *Desi's Pizza*, in which we said *Rooker-Feldman* bars a claim "if the claim was 'actually litigated' in state court prior to the filing of the federal action," 321 F.3d at 419. But we do not read this language as imposing a new requirement that, in order for the "actually litigated" trigger to apply, the plaintiff's federal claims must be filed *after* the state claims reach a final judgment. In deciding whether a claim was "actually litigated" in state court for *Rooker-Feldman* purposes, we have consistently looked to the substance of the state court's judgment compared to the plaintiff's claims in the federal action. *See Parkview Assocs. P'ship*, 225 F.3d at 325-36; *Gulla*, 146 F.3d at 173. Filing the latter before the state court judgment does not escape *Rooker-Feldman's* grasp. The only timing relevant is whether the state judgment precedes a federal judgment on the same claims. *Desi's Pizza* itself is illustrative because there the state court reached final judgment *after* the plaintiff filed claims in federal court. Yet

we decided that the plaintiff's claims were not "actually litigated" because neither its state court pleadings nor the state court's judgment discussed or referenced the claims it filed in federal court. If in *Desi's Pizza* we had intended to adopt a new requirement that the state court must reach a final judgment prior to the filing of the federal action in order for the "actually litigated" trigger to apply, we had a full opportunity to do so. Furthermore, were we to find that the *Rooker-Feldman* "actually litigated" trigger did not apply to federal actions filed prior to the state court's final judgment, we would be encouraging parties to maintain federal actions as "insurance policies" while their state court claims were pending. This defeats an "elementary principle" underpinning the *Rooker-Feldman* doctrine—"that a party's recourse for an adverse decision in state court is an appeal to the appropriate state appellate court, and ultimately the Supreme Court under § 1257, not a separate action in federal court." *Parkview Assocs. P'ship*, 225 F.3d at 324.

ExxonMobil also argues that *Rooker-Feldman* should not apply in this case because it is not a party to the action in Delaware state court, in which only its subsidiaries, Yanbu and ECAI, are defendants. Indeed, we have consistently (and recently) held that *Rooker-Feldman* does not bar claims of plaintiffs who were not parties to the state court proceeding. *See Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 342 F.3d 242, 257 (3d Cir. 2003); *Marks v. Stinson*, 19 F.3d 873, 886 n.11 (3d Cir. 1994). But we have also noted that this limiting principle of the *Rooker-Feldman* doctrine "has a close affinity to the principles embodied in the legal concepts of claim and issue preclusion." *Valenti v. Mitchell*, 962 F.2d 288, 297 (3d Cir. 1992). Claims and issues decided against an entity bind also its parties in privity, including wholly-owned subsidiaries. *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 966 (3d Cir. 1991). Underscoring this common sense privity principle is the fact that ExxonMobil's interest in its federal claims is identical to its subsidiaries' interest in their state

court claims, because its right to recover is derivative of its subsidiaries' right to recover. Indeed, both Yanbu and ECAI are co-plaintiffs with ExxonMobil in the federal action.

As ExxonMobil's federal claims were "actually litigated" in state court, we need not analyze whether, under the alternative prong of the *Rooker-Feldman* doctrine, they were "inextricably intertwined with a previous state court adjudication." *Parkview Assocs. P'ship,* 225 F.3d at 327. We simply note that our case presents an equally clear application of the "inextricably intertwined" circumstance, which exists when "federal relief can only be predicated upon a conviction that the state court was wrong," *id.* at 325, or when "the federal court must . . . take action that would render [the state court's] judgment ineffectual," *FOCUS*, 75 F.3d at 840. By its own admission, ExxonMobil seeks to maintain its federal action as an "insurance policy" in order to relitigate the overcharge issue if SABIC prevails in its efforts to overturn the state court verdict in favor of ExxonMobil. If that were to happen, ExxonMobil's federal action would squarely be seeking to invalidate a final judgment of the state court, the very situation contemplated by *Rooker-Feldman's* "inextricably intertwined" bar.

* * * * *

Because ExxonMobil's federal claims were identical to the claims in which the Delaware Superior Court reached a final judgment, they are barred by the *Rooker-Feldman* doctrine. Even within our Court's narrow confines for *Rooker-Feldman,* this case is easily cabined. We cannot imagine a more classic invocation of the *Rooker-Feldman* jurisdictional bar than to preclude a party from maintaining a federal action as an "insurance policy" in case the state trial court decision in that party's favor is overturned by an appellate state court. We therefore vacate those aspects of the District Court's order addressing Civil Action No. 00-3841, the subject of this appeal, and remand with instructions to dismiss that action for lack of subject matter jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2130

EXXON MOBIL CORPORATION; EXXON CHEMICAL ARABIA, INC.; MOBIL YANBU PETROCHEMICAL COMPANY, INC.

v.

SAUDI BASIC INDUSTRIES CORPORATION
Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 00-cv-03 841)
District Judge: Honorable William H. Walls

Argued December 9, 2003

Before: AMBRO, FUENTES and CHERTOFF, Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the District of New Jersey and was argued on December 9, 2003.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that those aspects of the judgment of the District Court dated April 3, 2002 relating to Civil

Action No. 00-3841 are hereby vacated and ordered dismissed for lack of subject matter jurisdiction. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Kathleen Brower
Chief Deputy Clerk

Dated: March 24, 2004

Costs taxed in favor of Appellant, Saudi Basic Industries Corporation, as follows:

Appellant's brief	**$189.80**
Appellant's appendix	**411.40**
Appellant's reply brief	**146.40**
Sales tax	**55.64**
TOTAL	**$903.24**

Certified as a true copy and issued in lieu of a formal mandate on April 15, 2004

Teste: /s/_____
Acting Clerk, United States Court of Appeals
for the Third Circuit

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APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 98-4897 (WHW)

SAUDI BASIC INDUSTRIES CORPORATION, INDIVIDUALLY AND IN THE NAME OF, AND ON BEHALF OF, AL-JUBAIL PETROCHEMICAL COMPANY, A PARTNERSHIP,
Plaintiff,

v.

EXXONMOBIL CORPORATION,
Defendant.

Civil Action No. 00-3841 (WHW)

EXXONMOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., and MOBIL YANBU PETROCHEMICAL COMPANY, INC.
Plaintiffs,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Defendant.

OPINION

Walls, District Judge

This is a complicated dispute concerning the alleged misuse of a patent and alleged overcharges of royalties to a

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partnership. In the first lawsuit, Civil Action No 98-4897 (WHW) ("NJ-I"), Plaintiff Saudi Basic Industries ("SABIC") moves to clarify or reform a March 10, 2000 Stipulation where it agreed not to practice a technology that is the subject of a patent dispute. SABIC also moves pursuant to Rule 12(c) for partial judgment on the pleadings to strike Defendant ExxonMobil's ("Exxon") defenses of unclean hands and setoff. Exxon cross-moves to dismiss the Complaint pursuant to Rule 19 for SABIC's failure to join necessary and indispensable parties. The motion for clarification or reformation of the March 10 Stipulation is denied; the motion for partial judgment on the pleadings pursuant to Rule 12(c) is also denied. Exxon's cross-motion to dismiss pursuant to Rule 19 is denied; SABIC is not required to join either ECAI or KEMYA as an indispensable party.

In the second lawsuit, Civil Action No. 00-3841 (WHW) ("NJ-II"), SABIC moves to dismiss the complaint of Exxon based on the Foreign Sovereign Immunities Act, as well as on other jurisdictional grounds. Exxon moves to consolidate the NJ-I and NJ-II actions into a single lawsuit. The motion to dismiss is denied; the motion to consolidate is granted.

FACTS AND PROCEDURAL BACKGROUND

The claims asserted in this action have their origin in the late 1970's. Because of the number of parties, at the outset it is useful to list them and their relationships to each other: SABIC is a Saudi Arabian corporation, owned 70% by the Saudi government and 30% by private investors, with its principal place of business in Saudi Arabia. Exxon is a New Jersey corporation with its principal place of business in Texas. Exxon Chemical Arabia, Inc. ("ECAI"), a Delaware Corporation with its principal place of business in Texas, is a wholly-owned subsidiary of Exxon Overseas Corporation, which itself is a wholly-owned subsidiary of Exxon.

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KEMYA is a 50/50 limited liability partnership formed between SABIC and ECAI under Saudi Arabian law to manufacture polyethylene. Mobil-Yanbu ("Yanbu") is a Delaware corporation with its principal place of business in Delaware.

In the 1970's, SABIC approached a number of potential partners about the possibility of forming joint ventures in Saudi Arabia to manufacture polyethylene. The negotiations culminated in the formations of two joint ventures in 1980; one with Yanbu, the other with ECAI. Exxon is not a direct party to either of these agreements.

The first joint venture was formed by SABIC and Yanbu on April 19, 1980, and created the Saudi-Yanbu Petrochemical Co. ("YANPET"). The second joint venture was entered into by SABIC and ECAI on April 26, 1980, and established the Al-Jubail Petrochemical Co. ("KEMYA"). Both YANPET and KEMYA are limited liability partnerships existing under the laws of Saudi Arabia, and in the business of manufacturing polyethylene in Saudi Arabia.

Exxon asserts that both joint venture agreements provide that the agreements, including their Annexes[1] "when executed", constitute the "'***whole agreement***' between the Partners . . ." (Joint Venture Agreement, Art. 18.1 (emphasis added)) So, according to Exxon, the December 22, 1980 Service Agreement that is the subject of the NJ-I action, is expressly incorporated into the joint venture agreements, creating a "single package" of rights and obligations. This overall scheme required participation by Exxon and Mobil

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[1] The December 22, 1980 Service Agreement is an annex to the Joint Venture Agreement. Clause 10.1 of the Service Agreement provides: "The Agreement shall continue its force as long as the Joint Venture Agreement ***(to which this Agreement is Annex VI)*** continues in full force and effect, or until a termination pursuant to Clause 11.1 of this Agreement." (emphasis added)

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(not just ECAI and Yanbu), and Exxon argues that all parties understood that Exxon and Mobil (now "Exxon") were intended to benefit from the joint venture agreements. SABIC strongly refutes this version of the facts and asserts that the Service Agreement and Joint Venture Agreements constitute separate agreements.

NJ-I Action

By its amended complaint, SABIC seeks a declaration that KEMYA has ownership rights in proprietary information, including trade secrets and U.S. Patent No. 5,352,749, by virtue of a December 22, 1980 Service Agreement between KEMYA and Exxon.

Pursuant to the Service Agreement, Exxon, acting through its unincorporated division Exxon Chemical Company ("ECC"), agreed to provide certain services to KEMYA from time to time, including engineering, administrative, and technical services related to construction of a petrochemical plant at Al-Jubail in Saudi Arabia. (Am. Compl. ¶ 11.) Under the Agreement, processes or patents developed as a result of services provided under the agreement were deemed the property of KEMYA, subject to royalty-free licenses given to Exxon and its affiliates. The Agreement is governed by Saudi Arabian law.

In 1991, in an attempt to expand the capacity of its Al-Jubail petrochemical facility in Saudi Arabia, KEMYA requested that Exxon conduct a study of the plant reactors' ultimate capacity ("the URC study"). (Am. Compl ¶¶ 19-21.) In connection with that request, Exxon was given access to proprietary information belonging to KEMYA. *Id.* ¶ 22. SABIC alleges that such access occurred "well prior to the filing of the last of the patent applications that led to the '749 patent." The URC study was completed by July 1991.

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SABIC claims that Exxon has improperly withheld the results of the URC study, as well as other aspects of KEMYA's operations, and violated the '749 patent. Further, SABIC alleges that in March 1992, Exxon filed an application for a patent concerning the subject matter of the URC study without authorization. In October 1994, the U.S. Patent and Trademark Office issued the '749 patent, entitled "Process for Polymerizing Monomers in Fluidized Beds," to the holding company Exxon Chemical Patents, Inc. ("ECPI") as assignee. That patent describes a method to increase polyethylene production through a process known as "Super Condensed Mode Technology" ("SCM-T"). SABIC charges that Exxon illegally licensed or otherwise conveyed rights in the '749 patent and other KEMYA trade secrets without permission.

In the NJ-I action, SABIC brings suit on behalf of KEMYA for breach of the Service Agreement and implied covenants, specific performance (delivery of the '749 patent and related trade secrets), misappropriation of trade secrets, conversion, tortious interference with prospective economic advantage, unfair competition, and unjust enrichment. SABIC has not joined the other partner, ECAI, as a plaintiff because in its view, ECAI as a subsidiary of Exxon, would not sue its related corporation.

SABIC claims that Exxon expressly acknowledged SABIC and KEMYA's right to contest Exxon's claim of ownership to the technology at issue here. (Am. Compl., Ex. A.) The NJ-I complaint alleges that SCM-T belongs to KEMYA, and that it was wrongfully misappropriated by Exxon. Exxon disputes this argument, and avers that it had a right to practice SCM-T. (Answer ¶ 10)

The NJ-II Action—Unipol License

On or about September 28, 1980, SABIC entered into an agreement with Union Carbide Corp. ("UCC"), to have the exclusive sublicense for a gas-phase process to manufacture polyethylene in Saudi Arabia. This technology is referred to as Unipol® process. In exchange for its exclusive license, SABIC pays UCC, among other things, a running royalty. (Del. Compl. ¶ 10.)

SABIC entered into two sublicense agreements with YANPET and KEMYA, effective October 15, 1980, which gave those partnerships the right to use Unipol process in their respective plants to manufacture polyethylene. Under the sublicense agreements, both partnerships were required to pay SABIC a running royalty.

In NJ-II, Plaintiffs Exxon, Yanbu and ECAI claim that SABIC overcharged the partnerships by collecting royalties at a higher rate than agreed upon (the "royalty overcharges").

The Delaware Action

On July 24, 2000, SABIC filed a complaint against Yanbu and ECAI in the Superior Court of Delaware (Civil Action No. OOC-07-161-VAB ("Delaware action"). SABIC's complaint seeks declaratory relief against these defendants solely on the issue of whether the royalty charges were proper under the joint venture agreements. As said, in NJ-II, Yanbu and ECAI have accused SABIC of "over-charging" both partnerships for royalties in violation of the joint venture agreements.

DISCUSSION

SABIC and Exxon sharply disagree as to the nature of their overall contractual arrangements. As mentioned, they entered into a joint venture agreement in April 1980. The parties agree on this basic point, but disagree on everything that

follows. According to Exxon, the joint venture agreement served as an overall operating agreement for the parties, incorporating any future agreements or amendments. SABIC denies this and argues that the April 26, 1980 Joint Venture Agreement, the subject of NJ-II, and the December 22, 1980 Service Agreement, the subject of NJ-I, are separate and distinct and should not be joined in the same action. The Court now sets forth the most plausible nature of the parties contractual relationship, for that determination guides much of the analysis to follow.

The April 1980 Joint Venture Agreement entered into by SABIC and ECAI described the parties' multiple responsibilities for the partnership arrangement to manufacture polyethylene in Saudi Arabia. The Court agrees with Exxon and finds that the Joint Venture Agreement provided the overall contractual arrangement between the parties. This view is enforced by Article 18.1 of the Joint Venture Agreement,[2] which clearly states that the Joint Venture Agreement includes "[a]nnexes hereto, when executed" which constitute the "whole agreement" between the parties. The Joint Venture Agreement supersedes any other agreement or correspondence between the parties. Because the December 22, 1980 Service Agreement is "Annex VI" to the April 26, 1980 Joint Venture Agreement, it becomes part of the whole agreement between the parties. (Dec. 22, 1980 Service Agreement ¶ 10.1.)

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[2] See Joint Venture Agreement Between Saudi Basic Industries Corporation and Exxon Chemical Arabia, Inc., Art. 18.1, "This Joint Venture Agreement, including the Annexes hereto, when executed, constitute the **whole agreement** between the Partners as to the matters herein set out and accordingly **supersedes any previous agreement or correspondence** between the Partners and any other related letters/agreements." (emphasis added)

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With this in mind, the Court now analyzes each of the six motions brought by the parties in the NJ-I and NJ-II cases.

1. Motion to Clarify or Reform the March 10, 2000 Stipulation

SABIC seeks to clarify, and if necessary, reform the March 10, 2000 Stipulation ("March Stipulation") wherein it agreed not to practice SCM-T. SABIC seeks permission for its affiliated plants to operate at the lower range of the super-condensed mode, namely an allowable usage of up to 22 wt. % condensed phase when manufacturing polyethylene.

The March 10, 2000 Stipulation

The March Stipulation arose from SABIC's motion to dismiss Count IV of Exxon's Amended Counterclaims: Exxon accused SABIC of breaching its fiduciary duty to KEMYA by encouraging certain SABIC affiliates, including SHARQ, to use SCM-T. SABIC moved to dismiss, and contended that it had not conveyed SCM-T information to affiliates, and that none, including SHARQ, had any intention of using SCM-T without proper authorization. Exxon agreed to a dismissal of Count IV's counterclaims based on SABIC's representations in the March 10, 2000 Stipulation which was signed as an Order of this Court on April 3, 2000.[3]

[3] In the March 10, 2000 Stipulation (later the April 3, 2000 Order), SABIC represented to Exxon that, "[n]either SABIC, SHARQ, Yanpet . . . nor any SABIC affiliate (other than KEMYA) have used or practiced SCM-T Information. SABIC further represents that neither SABIC, SHARQ, Yanpet . . . nor any other SABIC affiliate (other than KEMYA) will use or practice the SCM-T Information until the ownership rights thereto are established and the owner expressly authorizes such use . . . ." Whether the Stipulation should have been signed as an Order of the Court is the subject of a separate motion.

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Univation Agreements

In April 1997, Exxon and UCC had formed a 50/50 joint venture, Univation, to commercialize, license and enforce SCM-T patents held by Exxon. The parties expressly agreed that SABIC could operate its recycle gas phase at or below 22 wt. %. (Agozzino Decl., Ex. A ¶ 12.02.) Schedule 12.02 identifies "SABIC" as the exempt licensee. (*Id.* at Schedule 12.02.)

According to SABIC, its management was unaware of the Univation Agreements and the fact that SABIC and its affiliates had been formally granted the right to practice "up to" 22 wt. % condensed. (Dr. Al-Ubaid Decl., ¶¶ 12, 13).

SABIC contends that as a result of this agreement, Exxon and UCC had covenanted between themselves and for Univation, that a limited portion of SCM-T patent rights (up to 22 wt. % condensed) would not be enforced by Univation against SABIC and its affiliates. SABIC's management later learned of the existence of these agreements.

Exxon contends that the Univation Agreements are immaterial to the present dispute and were produced long before the March Stipulation. According to Exxon, SABIC knew of the Univation Agreements before the Stipulation, and cannot now claim ignorance. In addition, "before summer", Dr. Al-Ubaid of SABIC knew of SHARQ's plans to practice over 17.4 wt. %. (Exxon Mem. In Opp'n to Mot. to Clarify ("Exxon Br.") at 8, *citing* 10/28/00 Al-Ubaid Dep. at 666.) However, SABIC did not notify Exxon or the Court of the breach of the March Stipulation.

Exxon argues that the Univation Agreements, despite assertions by SABIC, do not permit SABIC or SHARQ to operate between 17.4 and 22 wt. % condensed. Exxon argues: (1) that Schedule 12.02 of the Univation Agreements does not make any reference to SABIC's affiliates; (2) ¶ 12.02 of

the Univation Agreements does not apply to SCM-T information at or below 22 wt. %; (3) nothing in the Univation Agreements (or in the law) supports SABIC's interpretation that SABIC or SHARQ is a ~~third~~-party beneficiary; (4) ¶ 12.02 of the Agreements is neither a license nor a covenant not to sue. According to Exxon, the Univation Agreements are agreements between Univation and UCC and provide that Univation will not enforce the SCM-T patents in certain situations.

Permission to Use SCM-T up to 22 wt. %

Despite this Court's April 3, 2000 Order, SHARQ switched to higher condensed phase operations to cool its recycle gas. SHARQ decided to run plant tests up to 22 wt. % condensed as permitted by the Univation Agreements (but forbidden by the April 3 Order). SABIC claims that it did not know of SHARQ's plans until after the April 3 Order was executed.

SABIC then sought permission from KEMYA for SHARQ to operate at 22 wt. % because of its concern that KEMYA might be declared the owner of SCM-T instead of Exxon. Mr. Alaudah, the president of KEMYA, gave such permission (in exchange for a royalty) pending the outcome of this case. (*See* Exxon's Decl. of Elizabeth J. Sher ("Sher Decl."), Ex. P)

Based on that permission, on August 1, 2000, SHARQ began running tests at levels up to 22 wt. %. The tests were apparently successful, because SHARQ started operating regularly at these levels. (Al-Ubaid Decl. ¶ 20). SABIC argues that the sole purpose of the March Stipulation was to preclude any basis for an accusation that SABIC had made or was planning to make some unauthorized use of SCM-T information transferred improperly from KEMYA. SABIC argues that the phrase "until ownership rights thereto are established" was included because SABIC did not then envision any possibility of such authorization being obtained until

the litigation was resolved. SABIC believes that it has fully complied with the March 10 Stipulation and this Court's April 3 Order by obtaining contractual authority from everyone who could be an owner of the technology. SABIC states that no SCM-T information has been transferred to SHARQ. As a result, SABIC seeks to reform or clarify the Stipulation to reflect SHARQ's right to practice SCM-T information up to 22 wt. % condensed. The March Stipulation and April 3 Order are silent about SHARQ's right to practice up to 22 wt. % condensed. At that time, SHARQ had informed SABIC that it did not intend to practice over 17.4 wt. % condensed. SABIC now cites a "business need" to practice SCM-T up to 22 wt. % condensed, and seeks a clarification and reformation of the stipulation to reflect this.

Exxon's Argument

Exxon argues that the March Stipulation should not be clarified or reformed for several reasons. First, Exxon says that SABIC was and is violating the March Stipulation by allowing its affiliate, SHARQ, to practice SCM-T information before ownership is determined. Exxon also argues that SABIC's argument that the Univation Agreements allowed other parties to use the technology only matters if SABIC *loses* this case, because if KEMYA owns SCM-T information as SABIC contends in this lawsuit, then Univation or any other entity could not grant permission to use the technology.

Exxon alleges that in seeking "permission" for SHARQ to operate up to 22 wt. % condensed, SABIC engaged in improper *exparte* contacts with Mr. Alaudah. This was the subject of a series of submissions and hearings in August and September 2000 before Special Master Weiss on the subject of breach of the parties' agreement to avoid *exparte* contacts about the litigation with KEMYA employees. Exxon says that throughout these proceedings, SABIC failed to disclose

its contacts with Mr. Alaudah and its imminent plans to practice SCM-T.

SABIC has defended SHARQ's secret contacts with Mr. Alaudah, claiming that such contacts were "not related to the litigation," even though it now places these communications before the Court as evidence to justify the relief it seeks.

1. The March Stipulation Prohibits SHARQ's Use of SCM-T Information and Is Enforceable.

The March Stipulation is clear on its face as to the representations of SABIC: ". . . neither SABIC, SHARQ, YANPET, Petrokemya, nor any SABIC affiliate (other than KEMYA) will use or practice the SCM-T Information until the ownership rights thereto are established and the owner expressly authorizes such use." (March 10, 2000 Stip., 2) This Court disagrees with SABIC's assertion that the March Stipulation is ambiguous with regard to SHARQ's right to practice SCM-T Information.

SABIC's arguments that the Univation Agreements create rights for SABIC and its affiliates with regard to the SCM-T information are problematic for several reasons. First, there is little reason to believe that the Univation Agreements were not available for review by SABIC before SABIC and Exxon entered into the March Stipulation. The documents were produced to SABIC four months before the March Stipulation. The Protective Order did not prevent a business designee from having access to these agreements. (See Sher Aff., Ex. E.) Therefore, this Court finds that SABIC's proclaimed ignorance of the terms within the Univation Agreements is unreasonable and suspect.

Also, it is unclear whether Schedule 12.02 of the Univation Agreements granted SHARQ rights to practice SCM-T information. Schedule 12.02 of the Agreement does not explicitly include SABIC's affiliates and SABIC has not asserted a

compelling reason to find that the contract should be interpreted to include its affiliates.

Last, assuming that the Univation Agreements afforded rights to SHARQ to practice SCM-T information, Section 12.02 of these agreements was a statement of present intent between UCC and Exxon. There was nothing to preclude these two parties from amending the terms of the agreements so as to allow Univation to enforce the patents against SABIC.[4] This Court does not find the March Stipulation to conflict with the terms of the Univation Agreements. By the March Stipulation, SABIC agreed that SABIC and its affiliates would not use or practice the SCM-T Information until ownership rights were established and the owner expressly authorized such use. Exxon and UCC's earlier agreement not to enforce patent rights against SABIC does not relieve SABIC of its obligations under the March Stipulation. This Court finds that the March Stipulation is an unambiguous and enforceable agreement.

2. SABIC has failed to Demonstrate Permission.

SABIC has also failed to demonstrate permission for use of the SCM-T information. KEMYA's ownership is far from certain. It is unclear that the President of KEMYA, Mr. Alaudah's, grant of permission to SHARQ for use of the SCM-T information was proper.

Exxon argues that the documents governing KEMYA's operations require Board approval for any offer to sell or

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[4] SABIC argues that SABIC and its affiliates are third-party beneficiaries to these agreements. The question of whether SABIC and its affiliates were intended beneficiaries by the contracting parties will not be explored in this opinion. It is enough that the contracting parties had the ability to change the terms of the agreement according to their present intent and that the March Stipulation does not conflict with the terms of the Univation Formation Agreement to determine this motion.

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dispose of property of the Partnership. Mr. Alaudah, president of KEMYA, did not disclose his discussions with SABIC to the other partner, and in doing so, failed to follow KEMYA's approval processes. This Court finds that SHARQ did not receive proper permission to practice the SCM-T information.

3. No Justification to Clarify or Reform the Stipulation.

There is substantial reason to deny clarification or reformation of the stipulation: SABIC's motion offers no legal basis to justify reformation. Contract law generally allows reformation only where necessary "to express the agreement [the parties intended.]" Restatement (Second) of Contracts § 155 (1979). While "mutual mistake" can justify reformation, unilateral mistake cannot. See In Re Resorts International, 181 F.3d 505, 512 (3d Cir. 1999) ("'unilateral mistake of a fact unknown to the other party is not ordinarily grounds for avoidance of a contract.'"); see also Coca-Cola Bottling Co. v. Elizabethtown, Inc. v. Coca-Cola Co., 988 F.2d 386, 404 (3d Cir. 1993), *cert. denied*, 510 U.S. 908, 114 S.Ct. 289, 126 L.Ed.2d 239 (1993) (same). SABIC has neither raised the issue of mutual mistake, nor plead any facts of mutual mistake about the meaning of the March 10, 2000 Stipulation.

Although there is an exception to the general principle denying relief for unilateral mistake when the non-mistaken party "'knows or has reason to know of the unilateral mistake'". In re Allegheny International, Inc., 954 F.2d 167, 180 (3d Cir. 1992) (citations omitted), here SABIC has not plead any facts of its "unilateral mistake", much less Exxon's knowledge of any unilateral mistake. Moreover, modification of a consent order "should not ordinarily be granted 'where a party relies on events that actually were anticipated at the time it entered into a decree.'" Building & Constr. Trades Council of Philadelphia & Vicinity, AFL-CIO v. NLRB, 64 F.3d 880, 886 (3d Cir. 1995)(quoting *Rufo v. Inmates of*

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Suffolk County Jail, 502 U.S. 367, 385, 112 S.Ct. 748, 760, 116 L.Ed.2d 867(1992)).

This Court denies SABIC's motion to clarify or reform the March 2000 Stipulation because legal justification is absent. Unilateral mistake is not a basis for reformation of an Order. Since August 1, 2000, SABIC has been violating the April 3 Order by allowing SHARQ to practice SCM-T at levels of 22 wt. % condensed. A "business need" even if substantiated, is not a sufficient reason to ignore a Court Order. Because SABIC's motion is denied, Exxon's motion for expedited discovery on this issue is mooted.

2. SABIC'S RULE 12(C) MOTIONS TO STRIKE "UNCLEAN HANDS" AND "SET OFF" DEFENSES

In the second of its NJ-I motions, SABIC moves to strike, pursuant to Fed. R. Civ. P 12(c), Exxon's unclean hands and "set-off" defenses because these defenses are allegedly based on a separate agreement.

A. Standard of Review

A motion for judgment on the pleadings under Rule 12(c) is appropriate when the moving party establishes on the face of the pleadings that it is entitled to judgment as a matter of law. Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 290 (3d Cir. 1988); Soc'y Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1054 (3d Cir. 1980). The motion must be denied "'unless the movant clearly establishes that no material issue offset remains to be resolved and that he is entitled to judgment as a matter of law.'" Ilan-Gat Eng'rs, Ltd. v. Shelter Sys. Corp., 879 F.Supp. 416, 419 (D.N.J. 1994) (quoting Haves v. Cmty. Gen'l Osteopathic Hosp., 940 F.2d 54, 56 (3d Cir. 1991)). The movant carries the heavy burden of establishing beyond doubt that "no relief can be granted under any set of facts that could be proved." Taj Mahal

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Travel, Inc. v. Delta Airlines, 164 F.3d 186, 189 (3d Cir. 1998); Inst. for Scientific Info., Inc. v. Gordon & Breach, Sci. Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir. 1991)

In reviewing a 12(c) motion, the court must accept the nonmovant's allegations as true and view the facts and inferences in the light most favorable to the nonmoving party. Jablonski, 863 F.2d at 289-90; Ilan-Gat Eng'rs., 879 F.Supp. at 419.

B. Arguments

Exxon first argues that because SABIC is relying on matters outside the pleadings, the summary judgment standard should be applied. However, because in motions for judgment on the pleadings, the Court may consider the pleadings and any written instruments attached as exhibits, there is no need for conversion. Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 452 (7th Cir. 1998). The Court may also consider any documents referred to in the pleadings, including any undisputedly authentic documents that the claim or defense is based upon. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368 n. 9 (3d Cir. 1993).

Because SABIC has relied on the contents of Exxon's pleadings, together with the documents expressly referenced therein, these motions will be analyzed under Rule 12(c).

1. The Unclean Hands Defense Relates to the Joint Venture Agreement.

Under general principles of equity, "'[a party] who comes into equity must be with clean hands." Heuer v. Heuer, 152 N.J. 226, 238 (1998). Where a party has unclean hands with regard to the transaction at issue, the party cannot invoke the equitable powers of the Court. See id.

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SABIC relies on the argument that Exxon's "unclean hands" defense arises out of two separate agreements between different sets of parties, with the crux of the NJ-I lawsuit being Exxon's alleged breach of the December 22, 1980 Service Agreement. In response, Exxon asserts that SABIC acted with "unclean hands" in allegedly overcharging KEMYA for royalty payments based on the October 15, 1980 agreement ("royalty overcharges"[5]). SABIC says that Exxon cannot do this because the agreements described above are separate agreements.

As discussed above, this Court has determined that the NJ-I and NJ-II actions arise from one overall agreement. From that, the Court agrees with Exxon that SABIC has not met the high burden of establishing that relief could not be granted under any set of facts. SABIC's argument that the unclean hands defense should be stricken because it relates to a separate agreement is rejected.

2. Unclean Hands Defense Must Relate to Subject Matter of Complaint.

The unclean hands defense must relate closely to the subject matter of the complaint. In re New Valley Corp., 181 F.3d 517, 525 (3d Cir. 1999) ("the alleged inequitable conduct must be connected, i.e., have a relationship to the matters before the court for resolution"), *cert. denied*, 528 U.S. 1138, 120 S.Ct. 983, 145 L.Ed.2d 933 (2000). Properly viewed, the equitable maxim of unclean hands is a tool for the court, rather than a defense for the accused. Sears, Roebuck

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[5] The royalty overcharge claims are the subject of two other actions. One, pending before this Court, ExxonMobil Corp. v. SABIC, (00-3841), is the subject of a motion to dismiss for lack of jurisdiction. The other is pending before the Superior Court of Delaware, Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co. (Civil Action No. OOC-07-161-VAB) which Exxon seeks to dismiss.

& Co. v. Sears Plc., 744 F.Supp. 1297, 1309 (D. Del. 1990) ("In actuality, a defendant's claim of unclean hands . . . is not a defense at all. When presented with a claim of unclean hands, the court is primarily concerned with protecting its own integrity . . . ") The doctrine only comes into play when it is evident from the pleadings that the allegedly improper conduct is ***directly related*** to the conduct about which plaintiff complains, because only in such circumstances is the Court's equitable power implicated. New Valley, 181 F.3d at 525.

SABIC asserts that the contractual provision upon which Exxon bases its defense is separate, distinct and independent of the breach of contract claim raised by SABIC. When a party's equitable defense is not based upon a purported breach of a contractual provision at issue, such a defense may not serve to bar plaintiff's claims. See Laborers' Int'l Union of North Am. v. Foster Wheeler Corp., 26 F.3d 375 (3d Cir. 1994) (suit to compel arbitration under pre-hire agreement not barred by unclean hands because unclean hands premised on breach of different contractual provision).

However, this Court finds that there is a close enough relationship between the inequitable conduct and the claims in the lawsuit to give Exxon the opportunity to assert the defense. SABIC has not met its heavy burden of establishing beyond doubt that, "no relief can be granted under any set of facts that could be proved." Taj Mahal Travel, 164 F.3d at 189. The Court has already found that the Service Agreement and Unipol Agreement are part of the overall Joint Venture Agreement. The allegation by Exxon that SABIC has overcharged the joint venture in violation of the Joint Venture Agreement is conduct related to the breach of the same Joint Venture Agreement. SABIC's alleged unclean hands in overcharging the joint venture in NJ-II are directly relevant to its effort in NJ-I to invoke this Court's equitable powers and

enforce obligations supposedly owed by Exxon. This alleged conduct by SABIC could be considered unconscionable conduct that permeates the transaction as a whole. See Shell Oil v. Marinello, 120 N.J. Super. 357, 392 (N.J.Super.L. 1972) ("It is the effect of the inequitable conduct on the total transaction which is determinative whether the [unclean hands defense] shall or shall not be applied.").

3. Unclean Hands Defense Must Relate to the *Party* Alleged to Have Committed Wrongdoing.

SABIC's additional argument as to why the unclean hands defense should be stricken is that KEMYA is the real party in interest and the unclean hands defense is against SABIC. Because the unclean hands defense must relate to the *party* seeking that equitable relief, SABIC alleges that the unclean hands defense is improper.

Exxon argues that because SABIC is suing on behalf of KEMYA, there are no other partners against whom to assert the unclean hands defense. Even if KEMYA is innocent, SABIC's unclean hands would prevent it from suing derivatively on KEMYA's behalf. See Gaudiosi v. Mellon, 269 F.3d 873, 882 (3d Cir. 1959); Recchion v. Kirby, 637 F.Supp. 1309, 1315-16 (W.D. Pa. 1986) (holding that a shareholder with unclean hands cannot sue derivatively).

If SABIC as a derivative shareholder suing on behalf of KEMYA is found to have unclean hands, the Court finds that this wrongful conduct would bar SABIC from bringing the claims at issue. This view is well-established in case law. Recchion applied the doctrine of unclean hands to prevent plaintiff shareholder in a derivative action from complaining about the very conduct which he facilitated. The close connection between the plaintiff's own wrongful conduct and the wrongful conduct which was the basis of the derivative suit allowed the unclean hands defense to go forward. Id. at

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1315-16. Similarly, in Gaudiosi, in a derivative action for equitable relief related to a disputed proxy contest, the wrongful conduct of one of the contestants in intimidating the other stockholders abstain from voting their shares allowed an unclean hands defense. Gaudiosi, 269 F.3d at 882.

4. Exxon's Standing to Assert the Royalty Overcharge Claim as Its Unclean Hands Defense

SABIC's final argument in support of its motion to strike the unclean hands defense is that Exxon lacks standing to assert the royalty overcharge claim because it is neither a party nor a third-party beneficiary of the Joint Venture Agreement between SABIC and ECAI. The Court dismisses this argument for the reasons expressed in the following discussion of the setoff defense.

C. Setoff Defense

SABIC incorporates its previous New Valley argument that the lack of a close nexus between the defense and the complaint requires dismissal of the "setoff" defense and offers other arguments.

Setoff is a procedural device to allow a party to reduce the amount owed to an opposing party by the value of the opponent's cross-obligations to that party. U.S. v. York, 909 F.Supp. 4, 9 (D.D.C. 1995). "[A]party can have . . . setoff rights only against one asserting claims against himself." Nashville Lodging Co. v. Resolution Trust Corp., 59 F.3d 236, 246 (D.C. Cir. 1995). The common law right of setoff is permissive, not mandatory. See In re Monongahela Rye Liquors, 141 F.2d 864, 869 (3d Cir. 1944). It cannot be invoked when the general principles of equity would not justify it. York, 909 F. Supp. at 8.

The right to a setoff depends on the existence of mutual debts between the parties to the litigation. Id. at 9.; see also,

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In the Matter of Bevelli, Bressler & Schulman, 896 F.2d 54, 57-58 (3d Cir. 1990) ("The right of setoff depends on the existence of mutual debts and claims between creditor and debtor."). In other words, direct privity of contract is required before any setoff may be claimed. York, 909 F.Supp. at 9.

1. SABIC's Arguments

a. Privity Required for "Setoff" Defense

According to SABIC, Exxon lacks standing to assert a setoff for the alleged royalty overcharges, losses and damages suffered indirectly by ECAI, because Exxon was neither a party to the Univation Agreement, nor to the Joint Venture Agreement. The overcharges, even if proved, cannot create any obligation by SABIC to pay Exxon. In this situation, a setoff is barred. Capuano v. U.S., 955 F.2d 1427, 1430 (11th Cir. 1992) ("It goes without saying that neither party may offset moneys in its hands belonging to some other party.").

b. Disagreement About Exxon's Third-Party Beneficiary Status

SABIC also argues that Exxon lacks standing to assert "setoff" because it was not an intended third-party beneficiary of the KEMYA joint venture. For Exxon to have standing, it must demonstrate that it was an intended third-party beneficiary of the KEMYA joint venture. Grant v. Coca-Cola Bottling Co., 780 F.Supp. 246, 248-49 (D.N.J. 1991) ("[i]n order to qualify as a third-party beneficiary, the claimant must show that the contract was 'made for the benefit of [that] party within the intent and contemplation of the contracting parties") (citations omitted). It must be more than "mere knowledge" that some third-party may incident-tally benefit; rather, it must be a "motivating factor." See Grant, 780 F.Supp. at 249.

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According to SABIC, not only has Exxon failed to plead the required facts, but has failed to demonstrate any basis for its standing to assert a setoff based on the alleged royalty overcharge, except to assert its corporate parent status of ECAI, the true party in interest. However, ECAI, says SABIC, is an independent corporation, created under Delaware law, and a wholly owned subsidiary of Exxon Overseas Corp., an independent corporation, which is in turn a subsidiary of ExxonMobil. Exxon disputes this, and claims that it owns 100% of both companies, and therefore is the true "party-in interest."

Although Exxon is a grandparent company of ECAI, the corporate relationship, in and of itself, is not enough to confer standing. As a matter of law, Exxon as a distant parent to ECAI cannot demonstrate that it is an intended beneficiary because any benefit it receives as a parent (such as profits earned by the subsidiary) is indirect and incidental. See Dow Corning v. Chem. Design, Inc., 3 F.Supp.2d 361, 365-66 (W.D.N.Y. 1998). If Exxon cannot prosecute the royalty overcharge claim directly, it cannot do so indirectly by an affirmative defense or setoff.

Consequently if SABIC has overcharged KEMYA, any refund is owed to KEMYA, not to Exxon, a non-party to the Unipol transaction upon which the royalty overcharge claims are based. Such are the arguments of SABIC.

2. Exxon's Argument: SABIC has not met its burden

Exxon counters that SABIC's motion for partial judgment on the pleadings to dismiss Exxon's setoff defense must be denied absent a showing that Exxon can prove no set of facts that would sustain the defense.

Although Exxon asserts that it was an intended third-party beneficiary, it does not directly answer SABIC's charge that a grandparent is not a third-party beneficiary *per se*. See

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In re Bacigalupi, Inc., 60 B.R., 442, 446 (B.A.P. 9th Cir. 1986) (stating that a setoff claim 'cannot fail for lack of mutuality' where complaint in other acts *alleges* third-party beneficiary status)

Exxon avers that its allegations as a third-party beneficiary suffice for purposes of this motion. See Ilan Gat Eng'rs, 879 F.Supp. at 419. Exxon has expressly pled its third-party status (NJ-II Compl. ¶ 28), and argues that this suffices for its designation as a third-party beneficiary. See Caldwell Trucking PRP Group v. Spaulding Composites Co., 890 F.Supp. 1247, 1252 (D.N.J. 1995) (considering pleadings filed in other courts for purposes of 12(b)(6) motion).

Exxon argues that even beyond the pleadings, the facts demonstrate that it is a third-party beneficiary because the agreement names Exxon, and operates to its benefit. See ESI, Inc. v. Coastal Corp., 61 F.Supp.2d 35, 73-74 (S.D.N.Y. 1999) (holding that, although defendant was not a signatory to joint venture agreement, plaintiff could bring breach of contract claim against defendant where defendant participated in contract negotiations and drafting and had obligations related to joint venture).

Finally, Exxon argues that any questions of fact as to Exxon's third-party status cannot be resolved on a 12(c) motion, or a motion for summary judgment. See Pension Fund-Mid Jersey Trucking Indus.–Local 701 v. Omni Funding Group, 731 F.Supp. 161, 171 (D.N.J. 1990) (denying motion for summary judgment in view of issues of fact of "whether parties were intended beneficiaries of contract"); see also Consolidated Rail Corp. v. Portlight, Inc., 188 F.3d 93, 98 (3d Cir. 1999) (denying 12(c) motion where pleadings contained no information on the factual question, and the factual record was still undeveloped).

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3. Conclusion

The Court finds that for purposes of this motion, Exxon's allegations of its third-party beneficiary status must be accepted and finds that Exxon has sufficiently pled its third-party status. This Court agrees with Exxon and finds that a question of fact as to Exxon's third-party status cannot be resolved on a 12(c) motion for summary judgment. It is sufficient now for Exxon to have plead its third-party beneficiary status. The Court denies SABIC's Rule 12(c) motion.

3. Exxon's Motion to Dismiss Pursuant to Rule 19

In the third NJ-I motion, SABIC purports to bring derivative claims on behalf of KEMYA asserting that Exxon is obligated under contract and tort law to assign the rights of SCM-T information to KEMYA. Yet, SABIC has failed to name ECAI, the other partner in KEMYA, as a defendant. Exxon disputes SABIC's right to sue derivatively on KEMYA's behalf, and has preserved its defenses related to SABIC's failure to name either KEMYA or ECAI as indispensable parties. Exxon now moves to dismiss SABIC's derivative claims pursuant to Fed. R. Civ. P. 19 for failure to join a necessary and indispensable party. Alternatively, Exxon requests that this Court grant SABIC a 14-day leave to cure its defective pleading by adding ECAI as a defendant.

Rule 19 sets out separate tests for determining whether a party is "necessary"[6] and "indispensable."[7] If the court finds

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[6] See Fed. R. Civ. P. 19(a):

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction . . . shall be joined as a party in the action if (1) **in the person's absence complete relief cannot be accorded** . . . (2) the person claims an interest . . . and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties

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that a party is a "necessary one," it should direct the plaintiff to amend its complaint to add the person. Failure to comply with such an order may result in dismissal of the plaintiff's action. See Window Glass Cutters League of Am., AFL/CIO v. Am. St. Gobain Corp., 428 F.2d 353, 354 (3d Cir. 1970); Rainville Co. v. Consupak, Inc., 407 F.Supp. 221, 225 (D.N.J. 1976). When joinder is not feasible, the action must be dismissed if the unnamed person is "indispensable." Courts which analyze joinder fully consider each factor listed in Rules 19(a) and 19(b) to determine whether joinder or dismissal is required. See Provident Tradesmens Bank v. Trust Co. v. Patterson, 390 U.S. 102, 118, 88 S.Ct. 733, 741 (1968).

Exxon complains that SABIC has not named either ECAI or KEMYA as a defendant. SABIC responds that Exxon and ECAI are effectively the same entity because Exxon stands in ECAI's shoes. SABIC alleges that its failure to add ECAI is justified by the futility of asking ECAI to "sue its parent or

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> subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations . . .
>
> (emphasis added)

[7] See Fed. R. Civ. P. 19(b):

> If a person described in subdivision (a)(1)-(2) . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, . . . the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

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otherwise take action contrary to Exxon's interests." (First Am. Compl. ¶9).

In derivative actions, a plaintiff should name the real party in interest to prevent the risk of dismissal.[8] Cases have applied the same rule to partnerships and have dismissed derivative claims when the partnership was an absent party. See Bankston v. Burch, 27 F.3d 164, 167 (5th Cir. 1994) ("the partnership is . . . an ***indispensable*** party without whom the lawsuit should not go forward.").

In the Third Circuit, however, the rule has been modified such that "at least in certain cases, it is possible that a partnership's interest can be effectively represented in litigation by participation of its partners." HB General Corp. v. Manchester Partners, L.P., 95 F.3d 1185, 1193 (3d Cir. 1996).

In general, federal courts are extremely reluctant to grant motions to dismiss based on nonjoinder, and dismissal will be ordered only when the defect cannot be cured and serious prejudice or inefficiency will result. See Provident Tradesmen Bank & Trust, 390 U.S. at 118, 88 S.Ct. at 743 ("To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it had examined the situation to determine whether it can proceed without him."), With that in mind, the Court will determine whether ECAI or KEMYA are necessary and indispensable parties.

[8] See 7 Charles Alan Wright, et. al., *Federal Practice and Procedure* § 1615, at 230-31 (2d. Ed. 1986) (the corporation on whose behalf a derivative action is brought is a necessary party upon which any decision is binding."); see also, Ross v. Bernard. 396 U.S. 531, 538 (1970) (quote)

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A. Is Either ECAI or KEMYA[9] a "Necessary Party" under Rule 19(a)?

SABIC argues that KEMYA is not a necessary party because it meets none of the criteria of Rule 19(a): first, Kemya is not a party in whose absence "complete relief cannot be accorded." Fed. R. Civ. P. 19(a)(1). A decision in favor of SABIC (acting derivatively) for KEMYA would restore the misappropriated asset to KEMYA, and end this dispute. Alternatively, a decision in favor of Exxon would end the dispute by binding SABIC, KEMYA, and ECAI. KEMYA cannot file another claim without SABIC's express authorization, and a binding decision upon SABIC precludes this possibility. Also, ECAI is the only other partner, and it will not take action against its parent. Ono v. Itoyama, 884 F. Supp. 892, 899 (D.N.J. 1995) ("The Court may presume a 50% shareholder would not agree to initiate litigation against himself."). In SABIC'S view, there can be complete relief without naming ECAI or KEMYA as defendants. This Court agrees with SABIC's argument.

Next, SABIC argues that the absent party's ability to protect its interest is not prejudiced. Federal Rule of Civil Procedure 19(a)(2) is intended to either allow an absent party to protect its interests in the event they differ from the parties already in the litigation, or to ensure that the existing parties adequately represent interests of the absent party. Also, joinder is not required when the party, even if joined, could not protect its own interests. Exxon's control over ECAI, coupled with the absence of any other partner to act on

[9] For purposes of this motion, the reader should assume that arguments regarding the addition of KEMYA as a party would also apply to arguments for adding ECAI as a party. This Court will not continue to reference both throughout this motion.

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KEMYA's behalf, thwarts KEMYA's ability to act independently, so KEMYA is not prejudiced by its absence.

Rule 19(a)(2)(ii) provides that when non-joinder of the absent party could subject the other parties to "multiple, double, or otherwise inconsistent lawsuits", joinder is necessary. Hagstrom v. Breutman, 572 F.Supp. 692, 701 (N.D. Ill. 1983). It should be noted that Rule 19 protects only against inconsistent obligations, not inconsistent adjudications. See RPR & Assoc. v. O'Brien/Atkins Assoc., P.A., 921 F.Supp. 1457, 1464 (M.D.N.C. 1995). The Third Circuit agrees that Rule 19 is not triggered merely by inconsistent adjudications. See Field v. Volkswagenwerk AG, 626 F.2d 293, 301-02 (3d Cir. 1980). (The mere risk that a defendant who has successfully defended against a party may be found liable to another plaintiff in a subsequent action does not necessitate joinder of all of the parties in one action.)

SABIC argues that there is no scenario under which ECAI could be exposed to inconsistent obligations: There are only two partners in KEMYA, ECAI (owned and controlled by Exxon) and SABIC. Because KEMYA cannot act without SABIC's express authorization, there is no risk of multiple lawsuits or inconsistent obligations.

Exxon counters that SABIC does not represent KEMYA's interests. Exxon points to three instances when SABIC's and KEMYA's interests have conflicted. First, SABIC offers SCM-T as a major advance over Unipol® technology, and asserts that it would have the automatic right to freely use and sublicense SCM-T, if it is determined to be owned by KEMYA. This conflicts with the spirit of the Unipol Agreement between SABIC and KEMYA, which allows KEMYA to license its major advances to SABIC and UCC, without allowing SABIC to sublicense them further. (SABIC/KEMYA UCC License XI.9, Sher Aff., Exh. C).

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SABIC is advancing a position that conflicts with KEMYA's interests, says Exxon.

Second, SABIC earlier conceded that SHARQ, its half-owned affiliate, and a direct competitor of KEMYA, is currently using SCM-T, in violation of the March Stipulation that "neither SABIC, SHARQ, YANPET, PetroKEMYA, nor any SABIC affiliate (other than KEMYA) will use or practice the SCM-T information until ownership rights are established." According to Exxon, SABIC's violation demonstrates that it has acted, and will continue to act against KEMYA's interests.

Third, SABIC's alleged overcharging of the KEMYA partnership and efforts to prevent Exxon from litigating the overcharge claims represent another example that SABIC has compromised KEMYA's interests. Exxon argues that KEMYA's interests will not be adequately protected unless either ECAI or KEMYA is joined.

The Court agrees with SABIC that complete relief could be accorded to the parties without KEMYA's presence and that KEMYA lacks interests that would leave the parties subject to inconsistent obligations. But, this Court finds that KEMYA does have independent interests with regard to its licensing relationships, as Exxon describes, that would make it a necessary party under Rule 19(a), "if feasible."

B. Under Rule 19(b), All Indispensable Parties Must be Joined

SABIC does not agree that KEMYA and ECAI are necessary parties, so in its view, no further inquiry under Rule 19(b) is necessary. See Janney Montgomery Scott v. Shepard Niles Inc., 11 F.3d 399, 405 (3d Cir. 1993). ("A holding that joinder is compulsory under Rule 19(a) is a necessary predicate to a district court's discretionary determination under Rule 19(b) that the party is indispensable."). SABIC

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points out that even if ECAI is deemed "necessary," not all necessary parties are indispensable. RPR & Assoc., 921 F.Supp. at 1463. The practical effect here is that if the Court finds ECAI or KEMYA to be indispensable, their addition would destroy diversity jurisdiction and require the dismissal of this case.

When a necessary party who should be joined cannot be joined, the Court must analyze the factors in Rule 19(b) to determine whether to proceed without the absent party, or to dismiss the action.[10] If the merits can be determined without prejudice to the rights of the necessary but absent parties, a court of equity will strain hard to reach that result. See Bourdeau v. Pacific Western Oil. Co., 299 U.S. 65, 70, 57 S.Ct. 51, 81 L.Ed. 42, 53 (1936) *reh'g denied*, 299 U.S. 622, 57 S.Ct. 228, 81 L.Ed. 458 (1936). "In determining whether a party is indispensable, the court must consider the practical potential (for prejudice in the context of the particular factual setting . . ." RPR & Assoc., 921 F.Supp. at 1463, *citing* Provident Tradesmen Bank & Trust Co., 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936.

SABIC suggests that the Rule 19(b) factors establish that KEMYA is not "indispensable." First, a decision on SABIC's derivative claim will not prejudice KEMYA or expose Exxon to multiple claims. Second, even if there were some conceivable risk to Exxon, there are measures by which such perceived risk can be averted or lessened. Fed. R. Civ. P. 19. Advisory Comment at 121. As example, injunctive relief could fully protect Exxon against risk of a later suit by

[10] Courts are reluctant to grant motions to dismiss based on nonjoinder, and do so only when the material defect cannot be cured and serious prejudice or inefficiency will result. See RPR & Assoc., 921 F. Supp. at 1463, *citing* Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 118, 88 S.Ct 733, 742, 19 L.Ed.2d 936 (1968).

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SABIC. Third, a judgment rendered in KEMYA's absence would adequately resolve the dispute as to all parties, including KEMYA, on whose behalf the action was filed. Finally, neither SABIC nor KEMYA will have an adequate remedy if the action is dismissed for nonjoinder.

H.B. General Corp., cited above, is instructive. That case addressed whether one partner in a limited partnership would be prejudiced by the absence of the partnership entity, because it could file its own identical claims against the defendant, thereby exposing it to multiple suits or inconsistent obligations. The Court initially determined that the partnership was a necessary party because of independent interests that it held. However, the Court, relying on pragmatic considerations, concluded that because there were only three partners, and there were no partners absent which might have an interest in suing the defendant, a decision against the plaintiffs fully protected the defendant, and no joinder was necessary.

Here, SABIC is the only partner able to prosecute the partnership's claims against Exxon. If SABIC loses on the merits, injunctive relief fully protects Exxon against further claims by SABIC on behalf of KEMYA. As SABIC argues, SABIC's derivative claim will not be prejudicial to KEMYA's interests or expose Exxon to multiple suits. Also, neither SABIC nor KEMYA has an adequate remedy if this action is dismissed for nonjoinder because of KEMYA Board deadlock. In light of these practical considerations, this Court finds that KEMYA is not an indispensable party in the context of Rule 19(b).

C. Waiver of Any Contention that KEMYA is an Indispensable Party

SABIC argues that Exxon has waived any contention that KEMYA is an indispensable party. SABIC interprets Exxon's

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counsel's representation in open court. "[w]e don't take the position that KEMYA is an indispensable party," as waiving the Rule 19 claim (Comprehensive Lorell Decl. Ex. N). Exxon denies that this one statement constitutes waiver. It admits that counsel made the statement only because SABIC treated Exxon and ECAI as the same party. After SABIC reversed itself, and asserted that Exxon cannot represent ECAI's interests, it became clear that either ECAI or KEMYA must be joined.

Even though Exxon's counsel said what he said, the Federal Rules expressly declare that a party cannot waive the defense of failure to join an indispensable party.[11] "[A]n objection based on the absence of an indispensable party can be raised at any time, even by an appellate court . . ." Travelers Indem. Co. v. Household Int'l, Inc., 775 F.Supp. 518, 529 (D.Conn. 1991).

An Illinois case advanced by SABIC, National Acceptance Co. v. Wechsler, 489 F.Supp. 642, 645 (N.D. Ill. 1980), is not helpful because the court held that the party seeking joinder had *contractually* waived its right to join myriad other parties. Id. at 645. Exxon has never contractually agreed to waive its right to bring this motion. There has been no waiver of Exxon's joinder claim.

D. Joinder and Diversity Jurisdiction

The Court surmises that SABIC does not seek to join ECAI or KEMYA because such joinder would destroy diversity jurisdiction—KEMYA and Exxon are Texas residents.

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[11] See Fed. R. Civ. P. 12(h), Advisory Comm. Notes to 1966 Amendment ("It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver . . . the more substantial defenses of . . . failure to join an indispensable party under Rule 19 . . . are expressly preserved against waiver . . . .")

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SABIC responds that even though both KEMYA and Exxon are Texas residents, courts have a duty in diversity cases to realign the parties according to their interests. See Develop. Finance Corp. v. Alpha Housing & Health Care, Inc., 54 F.3d 156, 159 (3d Cir. 1995) (Describing a "fundamental principle of federal jurisdiction that '[i]n determining the alignment of parties for jurisdictional purposes, the courts have a 'duty' to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.'") *(quoting* Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69, 62 S.Ct. 15, 17, 86 L.Ed. 47 (1941)). Because KEMYA's interest is to seek enforcement of the Service Agreement —which SABIC contends on KEMYA's behalf that Exxon has breached—KEMYA should be aligned with SABIC as a plaintiff.[12]

Exxon concedes that adding either ECAI or KEMYA will destroy diversity because a partnership is deemed a citizen of each state where its partners are individual citizens. Carden v Arkoma Assocs., 494 U.S. 185, 195, 110 S.Ct. 1015, 108 L.Ed.2d. 157 (1990), HB General, 95 F.3d at 1190 ("for diversity jurisdiction purposes, a limited partnership is considered a citizen of each state in which its partners . . . are citizens"). KEMYA is a citizen of Saudi Arabia, where SABIC is incorporated, and of Texas, where ECAI has its principal place of business. Joinder of KEMYA would destroy diversity because both KEMYA and Exxon are citizens of Texas. See VMC/PCA LP v. PCA Partners LP, 727 F.Supp. 1167, 1169 (N.D. Ill. 1989).

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[12] See Duffey v. Wheeler, 820 F.2d 1161 (11th Cir. 1987) (In a derivative action brought by one of two shareholders in a close corporation, court allowed corporation to be aligned with plaintiff, reversing lower court decision that corporation be named a nominal defendant).

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When joinder of a partnership to a derivative suit is not feasible due to diversity requirements, the suit must be dismissed unless all partners are joined as parties to the suit. HB General, 95 F.3d at 1193. However, applying the Rule 19(b) factors here, the Court finds that neither KEMYA nor ECAI is an indispensable party because this Court in equity finds that any judgment rendered in the party's absence will be adequate and not prejudicial to such absent parties since each is represented by 50% partners SABIC and Exxon (as grandparent to ECAI) in this lawsuit. Furthermore, SABIC will not have an adequate remedy if this action is dismissed for non-joinder. Neither ECAI or KEMYA will be considered and added as indispensable parties. Diversity jurisdiction remains.

4. SABIC's Motion to Dismiss the NJ-II Complaint Under the Foreign Sovereign Immunities Act (FSIA)

In NJ-II, SABIC moves to dismiss the complaint claiming immunity as a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et. seq.*, lack of personal jurisdiction and improper venue. Alternatively, SABIC argues that the court should abstain from exercising jurisdiction even if jurisdiction exists. Further, SABIC asks the Court to dismiss ExxonMobil as a third-party plaintiff because it lacks standing to assert the third-party beneficiary claims. In the event that the complaint survives, SABIC contends that the jury demand should be stricken.

A. Standard of Review

Unlike a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), in a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R Civ. P. 12(b)(1), no presumption of truthfulness attaches to the allegations in the complaint and the court may consider matters outside the pleadings such as affidavits and other

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material properly before the court. Mortensen v. First Federal Savings & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). In a Rule 12(b)(l) motion, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Mortensen, 549 F.2d at 891. "[T]he existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." Id. at 891. The plaintiff must not only demonstrate that a controversy existed at the time it filed suit but that it continues to exist throughout the litigation. Spectronics Corp. v. H.B. Fuller Co., 940 F.2d 631, 635 (Fed. Cir. 1991). A motion to dismiss for lack of subject matter jurisdiction predicated on the legal insufficiency of a claim may be granted if the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous." Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir.), *cert denied*, 501 U.S. 1222, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991)(quoting Bell v. Hood, 327 U.S. 678, 683, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

B. Subject Matter Jurisdiction

SABIC contends that this court lacks subject matter jurisdiction under both of the grounds that Exxon asserts. SABIC argues that this Court lacks diversity jurisdiction under 28 U.S.C. § 1332 and original jurisdiction under 28 U.S.C. § 1330, the Foreign Sovereign Immunities Act.

1. Diversity Jurisdiction

As SABIC argues, diversity jurisdiction does not exist in this case. Section 1332 confers diversity jurisdiction upon "a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States." It is undisputed that SABIC, an entity of which approximately

70% is owned by the Kingdom of Saudi Arabia (Al-Ubaid Decl. ¶ 3), qualifies as a "foreign state" under the definition of 1603(a).[13] However, because SABIC is not the party plaintiff, Section 1332 would not confer jurisdiction. (Compl. ¶ 5). See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 437 n. 5 (1989) (1916 amendments to §1332 eliminated diversity jurisdiction over "foreign state" defendants). As explained by the Supreme Court in Argentine Republic, "'[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous.'" Id. (citing H.R.Rep., at 14, S.Rep., at 13, U.S. Code Cong. & Admin. News 1976, p. 6613).

2. Original Jurisdiction Under the FSIA

SABIC further argues that this Court lacks original jurisdiction over this matter because of immunities SABIC claims under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. 1602 et. seq. The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 610, 112 S.Ct. 2160, 2164, 119 L.Ed.2d 394 (1992). The FSIA grants district courts subject matter jurisdiction over actions against "foreign states" pursuant to 28 U.S.C. § 1330(a), which provides that "district courts shall have original jurisdiction without regard to the amount in controversy of any nonjury civil action against a foreign state" as to any claim for which "the foreign state is not

[13] See 28 U.S.C. § 1603(a) and (b) ("An 'agency or instrumentality of a foreign state means any entity . . . (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . . .")

entitled to immunity under sections 1605-1607 of this title . . . ." The FSIA provides the "sole basis" for obtaining jurisdic-tion over a foreign sovereign in U.S. state and federal courts. Id.

Section 1604 of the FSIA provides that a foreign state shall be immune from the jurisdiction of U.S. federal and state courts, unless one of several statutory exceptions applies. 28 U.S.C. § 1604. When immunity under the FSIA is contested, the following burden-shifting analysis should be applied:

> [O]nce the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with showing that, under exceptions to the FSIA, immunity should not be granted, Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F.Supp. 289, 293-4 (S.D.N.Y. 1987), although the ultimate burden of persuasion remains with the alleged foreign sovereign. Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 289 n.6 (5th Cir. 1989).

Drexel Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari, 12 F.3d 317 (2d Cir. 1993) (quoting Cargill v. Int'l S.A. v. M/T Pavel Dybanko, 991 F.2d 1012, 1016 (2d Cir. 1993); see also Voest-Alpine Trading USA Corp. v. China New York Branch, 142 F.3d 887, 896 (5th Cir. 1998). As stated, it is undisputed that SABIC is a "foreign state" as defined by the FSIA. 28 U.S.C. § 1603(a). This Court will examine the applicability of exceptions to jurisdictional immunity under the FSIA.

3. Exceptions to Immunity

Section 1605 contains the disputed exceptions to sovereign immunity, commonly known as the "waiver" and the "commercial activities" exceptions:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver, (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . .

28 U.S.C. §1605(a)(1)-(2).

a. Waiver Exception is Narrowly Construed.

As quoted, 28 U.S.C. § 1605(a)(1) provides that a foreign state shall not be immune from suit if the foreign state ". . . waived its immunity either **explicitly or by implication** . . . ." (emphasis added). Here there was no express waiver of immunity. See Agunda v. Texaco, 175 F.R.D. 50, 52 (S.D.N.Y. 1997), *vacated on other ground sub. nom.* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998) (To establish express waiver, there must be a "clear, complete, unambiguous and unmistakable" manifestation of a sovereign's intent to waive its immunity.); see also Libra Bank Ltd. v. Bannco Nacional de Costa Rica, S.A., 676 F.2d

47, 49 (2d Cir. 1982). At issue here is whether there was an implied waiver of immunity.

Implied waiver has generally been limited to three categories: (1) when the foreign state has agreed to arbitration in another country; (2) when a foreign state has agreed that the law of a particular country shall govern a contract; or (3) when a foreign state has filed a responsive pleading in an action ***without raising the defense of sovereign immunity***. Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1291, n. 24 (11th Cir. 1999) (emphasis added). "The courts, loath to broaden the scope of the implied waiver provision, rarely have found that an action that does not fit one of the above three examples constitutes an implicit waiver." Id.

Exxon first argues that SABIC waived its immunity with its filing of the Delaware action that involved claims based on the same issues here, whether SABIC overcharged KEMYA and YANPET in breach of the Joint Venture Agreements. Relying on Matter of Rio Grande Transp. Inc., 516 F.Supp. 1155, 1159 (S.D.N.Y. 1981), SABIC argues that the mere filing of the Delaware action does not waive SABIC's immunity from suit elsewhere. According to SABIC, if Yanbu and ECAI wish to assert affirmative claims "arising out of the transaction or occurrence" as the subject matter of the Delaware action, they may only do so under 28 U.S.C. § 1607(b). 28 U.S.C. §1607(b) provides that foreign states cannot assert immunity with respect to any **counterclaim** "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." On that basis, SABIC asserts that Delaware is the only forum in the United States where Unipol royalty claims may be litigated. Exxon counters that SABIC has waived its immunity under Section 1605(a)(l) because nothing in the statute supports SABIC's

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view that it can waive sovereign immunity on a state-by-state basis.

This Court agrees with Exxon that SABIC cannot waive sovereign immunity on a state-by-state basis. SABIC points to no authority to support the assertion that only Delaware would have subject matter jurisdiction over this matter because of SABIC's waiver of immunity.

Moreover, in In re Oil Spill By Amoco Cadiz [Republic of France v. Standard Oil Co.], 491 F.Supp. 161 (N.D. Ill. 1979), the district court rejected a foreign state's argument that the mere filing of a complaint does not constitute waiver, and found that defendant had waived by implication its foreign state immunity to third-party claims under section 1605(a)(1). Id. at 167-168. There was an implied waiver because the foreign state had "[invoked] the jurisdiction of the United States to adjudicate claims which arose [outside the U.S.]" and because the claims at issue were based on the same transactions or occurrences as claims previously filed in U.S. courts by the foreign state. Id. And, as Exxon argues, the case offered by SABIC, In the Matter of Rio Grande Transp., Inc., 516 F.Supp. 1155 (S.D.N.Y. 1981), is not applicable because it involved a unique procedural rule that required the foreign state to file a conditional claim within six months of the plaintiff's claims. The foreign state defendant filed a conditional claim clearly asserting that the claim was to be considered only if its sovereign immunity defense was rejected. Here SABIC voluntarily began actions in two U.S. courts, and in the Delaware state action, seeks declaratory relief on the overcharge issue, the subject here.

Exxon also argues that SABIC waived its immunity by filing the NJ-I action. See 28 U.S.C. 1607(b); Matter of Rio Grande Transport, Inc., 516 F.Supp. 1155, 1159 (S.D.N.Y. 1981). According to SABIC, the filing of the NJ-I action alleging parent misappropriation does not serve to waive

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SABIC'S immunity from suit on subjects which do not arise out of the occurrence of that patent misappropriation. And SABIC argues that the only claims that Exxon (not Yanbu or ECAI) may file against SABIC in New Jersey are narrow counterclaims which are statutorily limited and circumscribed.[14]

This Court has already determined that the NJ-I, NJ-II and the Delaware action are based upon breaches of one overall agreement. Based on that determination, the filing of the NJ-I action waives SABIC's immunity from suit on the claims in NJ-II and the Delaware courts. In the NJ-I action, Exxon asserted various counterclaims. However, SABIC ***never raised*** sovereign immunity in response to such counterclaims, and expressly conceded jurisdiction under 28 U.S.C. § 1332 thereby evincing an intent to waive any sovereign immunity. This Court concludes that failure to raise sovereign immunity in the first responsive pleading constitutes an implied waiver. See Aquamar, 179 F.3d at 1291 ("Congress in enacting the FSIA, contemplated that a private attorney representing a foreign state could waive sovereign immunity implicitly by filing, on behalf of the state, a responsive pleading that did not raise the defense," *citing* H.R. Rep. No. 94-1487, at 18 (1976)).

Because SABIC has repeatedly invoked the protection of U.S. courts, including this Court, for claims against Exxon on

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[14] 28 U.S.C. §1607 provides: "In any action brought by a foreign state . . . in a court of the [U.S.] or of a state, the foreign state shall not be accorded immunity with respect to any counterclaim—(a) for which a foreign state would not be entitled to immunity under section 1605 . . . had such claim been brought in a separate action against a foreign state; or (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."

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the very same agreements among the very same parties, this Court determines that immunity under the FSIA has been waived by implication.

b. Commercial Activity" Exception

Exxon contends that the first and third clauses of Section 1605(a)(2) apply and defeat any jurisdictional immunity that SABIC has under the FSIA. Section 1605(a)(2) provides that a foreign state shall not be immune in any action based upon:

> a commercial activity carried on in the United States by a foreign state; or upon an act performed in the [U.S.] in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and . . . causes a direct effect in the [U.S.].

28 U.S.C. § 1605(a)(2).

As written, Section 1605(a)(2) provides that a foreign state shall not be immune from the jurisdiction of the United States in any case in which the action is based upon "a commercial activity carried on in the United States by the foreign state." Under Section 1603(e), the "commercial activity carried on in the United States by a foreign state" means "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). "Commercial activity" is defined as "either a regular course of commercial conduct or a particular commercial transaction or act,' "the commercial character [of which] shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

This Court must determine whether SABIC's cause of action here was "based upon" commercial activity that had

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"substantial contact" with the United States. Exxon states that its breach of contract and fiduciary duty claims are based upon the following commercial activity in the U.S. by SABIC: (1) SABIC contracted with UCC, an American corporation, for exclusive rights to Unipol technology in Saudi Arabia; (2) the payments under this contract with UCC were made in New York for technology that SABIC had passed along to KEMYA and YANPET at a higher cost; (3) the failures to disclose had occurred during multiple KEMYA and YANPET Board Meetings that occurred in the U.S.; (4) payments from KEMYA and YANPET to SABIC for their rights to use Unipol technology were routed through banks in the United States en route to SABIC's accounts in Saudi Arabia.

SABIC counterargues that the commercial activity upon which Exxon relies is not a necessary element of their claim for breach of contract and fiduciary duty claims and does not meet the "based upon" requirement under the Act. (A1-Ubaid Decl. ¶¶ 6-7). The Supreme Court in Saudi Arabia v. Nelson, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993), described "based upon" as "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357, 113 S.Ct. at 1477. "[A] claim is 'based upon' events in the United States if those events establish a legal element of the claim." Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (7th Cir. 1991). This Court agrees with SABIC that Exxon's claims are not based upon commercial activity alleged to have occurred in the U.S. Exxon is claiming that SABIC had breached the Joint Venture Agreements and its fiduciary duty in overcharging royalties under two license agreements at a cost in excess of what was agreed upon under the Joint Venture Agreements. These two license agreements and the Joint Venture Agreements were all executed under,

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and are governed by, Saudi Arabia law. According to SABIC and undisputed, "[t]he costs incurred by SABIC to acquire and license the technology to KEMYA and YANPET were incurred in Saudi Arabia, and the payments SABIC received from both partnerships came to its bank in Saudi Arabia." (SABIC Reply Br. at 17.)

SABIC's failure to disclose the overcharge practice to their ECAI and Mobil Yanbu counterparts at KEMYA and YANPET board meetings that occurred with the United States does not constitute an "act" that occurred within the United States. See Chemarketing Indust., Inc. v. C.V.G., No. 97 CIV. 1791, 1998 WL 199937 at *3 (S.D.N.Y. April 23, 1998)(failure to open a letter of credit cannot constitute an act that occurred in the United States). Further, the facts that UCC was an American corporation and that SABIC directed payments to UCC to New York are related to (as argued below, with respect to personal jurisdiction) but are not the activities upon which Exxon's legal claim is based. That YANPET and KEMYA's payments to SABIC were routed through the United States do not constitute substantial contact with the U.S. as required by the exception.

Exxon next argues that any immunity that SABIC has under the FSIA is defeated by the exception found in the third clause of Section 1605(a)(2): a foreign state shall not be immune in any case in which the action is based "upon an act outside the territory of the [U.S.] in connection with a commercial activity of the foreign state elsewhere and that act causes a ***direct effect*** in the [U.S.]" 28 U.S.C. § 1605(a)(emphasis added). This clause requires the following elements to be satisfied to avoid immunity under the FSIA: "(1) an act outside the [U.S.] (2) in connection with commercial activity outside the [U.S.] (3) that causes a direct effect in the [U.S.]." Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 894 (5th Cir. 1998).

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Exxon claims that the direct effect exception applies because SABIC entered into and breached Joint Venture Agreements with two American corporations. ECAI and Yanbu, causing Plaintiffs and Exxon, a third-party beneficiary, great financial loss. Exxon argues that if any money is owed, such is owed directly to ECAI and Yanbu. SABIC does not contest that the complaint is based upon SABIC's acts with regard to these alleged overcharge practices and that these acts were in connection with commercial activity outside the U.S.

However, in SABIC's view, mere economic loss to an American plaintiff arising from a breach of performance occuring outside the U.S. is not a "direct effect." See Dominican Energy Ltd., Inc. v. Dominican Republic, 903 F.Supp. 1507, 1515 (M.D. Fla. 1995). According to SABIC, the financial loss to ECAI and Yanbu was not direct because SABIC overcharged KEMYA and YANPET, not ECAI and Yanbu.

Exxon counters that the contractual obligations at issue are directly owed to ECAI and Yanbu and that the technicalities of corporate structure cannot be used to negate direct effect. Also, Exxon argues that SABIC's assertion that "mere economic loss" to an American plaintiff does not satisfy the "direct effect" requirement conflicts with many cases in which courts have found that economic injury to U.S. entities constituted a "direct effect" in the U.S. See, e.g., Voest-Alpine, 142 F.3d at 897 ("we hold that a financial loss incurred in the United States by an American plaintiff, if it is an ***immediate consequence*** of the defendant's activity, constitutes a direct effect sufficient to support jurisdiction under the third clause of the commercial activity exception" (emphasis added)); Ampac, 797 F.Supp. at 977 (finding that based on allegation in complaint that American Defendants would suffer injury to business reputation and lose profits in

the U.S., that the "harm alleged follows as an 'immediate consequence' of Defendants' activities".)

The Second Circuit in Texas Trading has noted:

> Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss. Accordingly, the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a 'direct' financial loss.

647 F.2d at 312; see also Tifa Ltd. v. Republic of Ghana, 692 F.Supp. 393, 403 (D.N.J. 1988) (finding direct effect due to plaintiff's financial loss from non-payment for goods, even though the money owed by the Ghanaian government was to be paid in Ghana through an intermediary Ghanaian corporation); Crimson Semiconductor, Inc. v. Electronum, 629 F.Supp. 903, 907 (S.D.N.Y. 1986) (finding exception applied 'because the breach had a 'direct effect' in the United States, namely, a financial loss suffered by the beneficiary of the contract, a New York corporation.").

Also, with regard to the "direct effect" exception, the leading case. Weltover, 504 U.S. 607, 112 S.Ct. 2160, "teaches that the effect in the United States need only be slight." Id. at 618; 112 S.Ct. at 2168; Ampac Group, Inc. v. Republic of Honduras, 797 F.Supp. 973, 977 (S.D. Fla. 1992). The effect need not be "substantial" and "foreseeable." Weltover, 504 U.S. at 618, 112 S.Ct at 2168. Rather, an effect "is 'direct' if it follows as an ***immediate consequence*** of the defendants' . . . activity.'" Id. (emphasis added); see also Ampac, 797 F.Supp. at 977.

The facts of Weltover illustrate how slight the effect could be to constitute "direct effect." The Weltover bond holders brought a breach of contract action against the Republic of Argentina and its central bank arising out of Argentina's

unilateral extension of the time for payment on the bonds issued as part of a currency stabilization plan. Id. at 609-10, 112 S.Ct. at 2163-2164. The District Court denied Argentina's motion to dismiss for lack of subject matter jurisdiction, and held that Argentina was not immune under the FSIA. The Court of Appeals affirmed. The Supreme Court defined "commercial activity" that is an exception to immunity under the FSIA: "[W]hen a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA." Id. at 614, 112 S.Ct. at 2166. Employing that definition, the Court found that Argentina was engaging in "commercial activity" when it unilaterally issued its bonds. Id. at 617, 112 S.Ct. at 2167. The Supreme Court also addressed whether Argentina's activities had a "direct effect" in the United States: Because the holders of the bonds could designate New York as one of several locations as the place of repayment, the rescheduling of those obligations necessarily had a "direct effect" in the United States." Id. at 619, 112 S.Ct. at 2168.

This Court finds that contrary to SABIC's assertion, there is no requirement of a "legally significant act in the U.S. beyond a financial loss" to satisfy the direct effect requirement. Voest-Alpine, 142 F.3d at 894 (refusing to ascribe a "legally significant act" requirement to the direct effect test); *see generally,* Weltover, 504 U.S. at 618; 112 S.Ct. at 2168. This Court concludes that ECAI, Yanbu, and Exxon's financial loss suffices for "direct effect" such that the commercial activity exception applies, abrogating SABIC's foreign sovereign immunity.

B. Personal Jurisdiction

SABIC further argues that Exxon's complaint should be dismissed because this Court lacks personal jurisdiction.

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1. Consent to Personal Jurisdiction

This Court finds that SABIC consented to personal jurisdiction in New Jersey when it filed the NJ-I action in 1998. As discussed, NJ-I is based on claims arising from the same overall transaction as the matter here. It follows then that SABIC's initiation of litigation in this forum state on claims arising out of the same transaction surrenders any objection to personal jurisdiction by SABIC. Gen'l Contracting & Trading Co. v. Interpole, Inc., 940 F.2d 20, 23 (1st Cir. 1991) (By availing itself of the benefits of the New Hampshire courts by instigating a lawsuit against the plaintiff, "it is inevitable that [the defendant] surrendered any jurisdictional objections to claims that [the plaintiff] wished to assert against it in consequence of the same transaction or arising out of the same nucleus of operative facts."); see generally, Adam v. Saenger, 303 U.S. 59, 67-68, 58 S.Ct. 454, 82 L.Ed. 649 (1938) (rejecting plaintiff's jurisdictional objections to counterclaims filed by defendant, the court held: "The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.")

SABIC refers to Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co., 558 F.2d 450 n.8 (8th Cir. 1977), Whistler Corp v. Solar Elecs., Inc., 684 F.Supp. 1126, 1131 (D. Mass. 1988), and Sullivan & Rilling, No. 94 c 539, 1996 WL 26840 *5 (N.D.Ill. Jan. 22, 1996) to support its proposition that, "as a matter of law, the filing and prosecution of a lawsuit does *not* constitute the requisite minimum contacts to establish personal jurisdiction." (SABIC's Mem. In Support of Mot. at 22.) However, unlike our situation here and there in General Contracting, the cases offered by SABIC do not deal with a former suit initiated by the defendant on claims arising out of

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a common transactional core. Because of this Court's conclusion that SABIC has consented to personal jurisdiction in this forum, a long arm analysis is unnecessary. That said, in further support of the existence of personal jurisdiction, this Court will conduct the analysis.

2. Minimum Contacts

a. Standard

Pursuant to Federal Rule of Civil Procedure 4(e), federal "district courts have personal jurisdiction over non-resident defendants to the extent authorized under the law of the forum state in which the district court sits." Sunbelt Corp. v. Noble, Denton & Assoc., Inc., 5 F.3d 28, 31 (3d Cir. 1993). New Jersey's long arm statute provides for personal jurisdiction as far as permitted by the Fourteenth Amendment to the United States Constitution. See N.J. Court Rule 4:4-4(c); Carteret Savings Bank, FA v. Shushan, 954 F.2d 141, 145 (3d Cir. 1992); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 284 (3d Cir. 1981). The question of whether this Court has jurisdiction over the defendant is determined by federal constitutional law. See Mesalic v. Fiberfloat Corp., 897 F.2d 696, 698 (3d Cir. 1990).

The Fourteenth Amendment permits a state to exercise jurisdiction over an out-of-state defendant only when "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958)). It is the plaintiff's burden to prove that the defendant has purposefully availed himself of the forum state. See Burke v. Quartey, 969 F.Supp. 921, 924 (D.N.J. 1971).

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To prove purposeful availment, a plaintiff may rely upon a defendant's specific contacts with the forum state. Personal jurisdiction pursuant to such contacts is known as specific jurisdiction. Specific jurisdiction is invoked when a claim is "relate[d] to" or "arises out of" the defendant's contacts with the forum. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984): Dollar Sav. Bank v. First Sec. Bank of Utah, 746 F.2d 208, 211 (3rd Cir. 1984).

A court must first determine whether the defendant had the minimum contacts with the forum necessary for the defendant to have "reasonably anticipate[d] being haled into court there." Wor1d-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980) (citations omitted). What constitutes minimum contacts varies with the "quality and nature of the defendant's activity." Hanson, 257 U.S. at 253, 758 S.Ct. at 1240, 2 L.Ed.2d 1283. In assessing the sufficiency of minimum contacts for personal jurisdiction, the court must focus on "'the relationship among the defendant, the forum and the litigation.'" Keeton v. Hustler, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984) (citations omitted). Otherwise stated, there must be at least "a single deliberate contact" with the forum state that relates to the cause of action. United States Golf Ass'n v. United States Amateur Golf Ass'n. 690 F.Supp. 317, 320 (D.N.J. 1988). The unilateral acts of the plaintiff, however, will not amount to minimum contacts. *Helicopteros*, 466 U.S. at 414, 10[illegible] S.Ct. at 1872; Hanson, 357 U.S. at 253, 78 S.Ct. at 1239-4[illegible].

Second, assuming minimum contacts have been established, a court may inquire whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Burger King, 471 U.S. at 476, 105 S.Ct. at 2184 (quoting Int'l Shoe Comp. v. Washington, 326 U.S.

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310, 320, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945)); Pennzoil Products Co. v. Colelli & Assoc., Inc., 149 F.3d 197, 201 (3d Cir. 1998).

Even if a non-resident has sufficient minimum contacts with the forum, the exercise of jurisdiction must still comport with "traditional notions of fair play and substantial justice." Int'l Shoe Co., 326 U.S. at 316, 66 S.Ct at 158. To determine the fairness and reasonableness of the forum's exercise of jurisdiction, it is necessary to consider the "burden on the defendant, the interests of the forum state and the plaintiff's interest in obtaining relief." Asahi Metal Indus. Co., v. Superior Court of California, 480 U.S. 102, 113, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987). The Asahi Court cautioned that "[t]he unique burdens placed upon who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long-arm of personal jurisdiction over national borders." Id. at 114, 107 S.Ct. at 1033.

28 U.S.C. 1330(b) provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction (when one of the exceptions to foreign sovereign immunity in §§ 1605-1607 applies] where service has been made under section 1608 of this title." This Court has established through its discussion of the waiver and commercial activity exceptions under § 1605 that subject matter jurisdiction exists. As long as proper service has been made (an issue not in dispute) and the requirements of due process satisfied, this Court has personal jurisdiction. See Weltover v. Republic of Argentina, 753 F.Supp. 1201, 1207 (S.D.N.Y. 1991).

A foreign state is entitled to the same constitutional due process protections as natural persons. Walpex v. Yacimientos Petroliferos Fiscales Bolivianos, 712 F.Supp 383, 390 (S.D.N.Y. 1989) (citing Texas Trading, 647 F.2d at

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307); Unidyne Corporation v. Aerolineas Argentinas, 640 F.Supp. 354, 360 (E.D. Va. 1985). Instead of requiring "minimum contacts" with a state, the analysis of minimum contacts with a foreign sovereign is nationwide. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490, 103 S.Ct. 1962, 1969, 76 L.Ed.2d 81 (1983); Texas Trading, 647 F.2d at 314; Ruiz v. Transportes Aereos Militares Ecuadorianos, 103 F.R.D. 458, 459-460 (1984). Furthermore, statutory personal jurisdiction for a foreign state is not limited to specific jurisdiction but general jurisdiction as well. See Walpex, 712 F.Supp. at 390.

b. Analysis

A court has specific jurisdiction over a defendant when that defendant has "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that '***arise out of or relate to***' those activities." Burger King Corp, 471 U.S. at 472, 105 S.Ct. at 2182, 85 L.Ed.2d 528. The Court finds that SABIC is subject to specific jurisdiction based on its contacts in this country that are related to the activities upon which this litigation is based. SABIC sent representatives to the U.S. Board meetings of KEMYA and YANPET where the alleged failure to disclose the over-charges occurred. (Sher Aff. ¶13). By SABIC's instructions, some of the payments from KEMYA and YANPET to SABIC under the SABIC-KEMYA sublicense passed through United States banks. Also, SABIC's payments to UCC, an American Corporation, under the Unipol Agreement took place in New York (Sher Aff., ¶¶ 5-6). As Exxon argues, evidence of payments by SABIC to UCC is related to the claims here because the alleged overcharges result from the differential between KEMYA and YANPET's payments to SABIC and SABIC's payments to the UCC. Further, Exxon alleges in the First Amended Complaint that some of the discussions between SABIC, Exxon, Mobil, ECAI and/or

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Mobil Yanbu before the Joint Venture Agreements took place in the U.S.

For personal jurisdiction to comport with "fair play and substantial justice," it must be reasonable to require the defendant to defend the suit in the forum state. See World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. at 292, 100 S.Ct at 564. To determine reasonableness, a court considers the following factors: the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering substantive social policies. Id. Only in "rare cases [do the] 'minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." Asahi Metal Indust. Co., Ltd. v Superior Court of Cal., Solano County, 480 U.S. at 116, 107 S.Ct. at 1034 (quoting Burger King, 471 U.S. at 477-478, 105 S.Ct. at 2184-2185.).

Not only did SABIC engage in deliberate activities in the United States related to the claims here, but SABIC also purposefully availed itself of the protection of the U.S. laws by filing the NJ-I and Delaware actions. Consequently, SABIC could reasonably anticipate being hauled into Court, especially since it was SABIC who originally hauled Exxon into this district court. Based upon the fact that SABIC is litigating two other lawsuits in the United States, one of which is in this forum, this Court concludes that it is not overly burdensome for SABIC to litigate this matter here. Because NJ-I and NJ-II involve claims related to an overall agreement, this Court has determined that the most efficient and convenient resolution of this matter would be to keep NJ-II in this forum and consolidate it with the NJ-I action (as

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further explained in this opinion). For these reasons, this Court finds that the personal jurisdiction of the matter comports with "fair play and substantial justice."

From allegations in the First Amended Complaint ("FAC"), this Court opines that further jurisdictional discovery may uncover evidence of SABIC's "continuous and systematic" contacts with the U.S. to support general jurisdiction. (FAC ¶ 13.) However, this Court finds that further discovery on this ground is unnecessary because of this Court's determination that personal jurisdiction exists through SABIC's consent to personal jurisdiction and because of this Court's specific jurisdiction over this matter.

C. Venue

SABIC also urges that Plaintiffs' complaint be dismissed for improper venue. 28 U.S.C. § 1391(f), which governs venue in actions against foreign states, provides:

> A civil action against a foreign state as defined in § 1603(a) of this title may be brought—
>
> (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated;
>
> (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under § 1605(b) of this title;
>
> (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in § 1603(b); or

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> (4) in the [U.S.] District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

SABIC argues that venue is improper in New Jersey because no events relating to plaintiffs' claims occurred here; there is no vessel or cargo here, and SABIC is neither licensed to conduct, nor does it conduct any business in New Jersey. SABIC argues that the only proper venue is the District of Columbia under §1391(f)(4) because a transfer to cure improper venue may be made only "to any district or division in which [the case] could have been brought." 28 U.S.C. §1406(a).

Exxon retorts that venue is proper because SABIC is doing business in New Jersey. As quoted above, subsection (3) of 28 U.S.C. §1391(f) states that venue is proper if the foreign state is "in any judicial district in which the agency or instrumentality is ***licensed to do business or is doing business*** . . . ." (emphasis added.) SABIC's 1999 Annual Report demonstrates that it has a facility in Wayne, New Jersey, through which it presumably distributes goods. (FAC, ¶¶ 13, 15; see Sher. Aff., ¶7, Ex. A). According to the FAC, SABIC has regularly sent its employees to technology exchange meetings at UCC's Bound Brook, New Jersey facility and has frequently communicated with UCC personnel there. (FAC, ¶ 15) SABIC has also contracted with New Jersey corporations, including Exxon for various projects (Id, ¶¶ 1, 13).

Exxon also argues that SABIC waived its right to object to venue when it filed the NJ-I action in this Court in 1998. Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344, 1349 (11th Cir. 1982); see also H.R. Rep. No. 94-1487, at 32 (1976) reprinted in 1976 U.S.C.C.A.N. 6604, 6631.

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SABIC reminds us that "doing business" has been defined in this district as "engaging in transactions there to such an extent and of such a nature that the state in which the district is located could require the corporation to qualify to 'do business' there". Vivadent (USA), Inc. v. Darby Dental Supply Co, Inc., 655 F.Supp. 1359, 1362 (D.N.J. 1987) (quoting Johnson Creative Arts v. Wool Masters, 743 F.2d 947, 954 (1st Cir. 1984)). SABIC argues that its activities in New Jersey are not of the extent to which New Jersey would require it to qualify to "do business" here.

First, it should be noted that the Vivadent and Johnson consider "doing business" as applied in section 1391(c), which relates to foreign corporations rather than a foreign state as defined under the FSIA. Second, it should be recognized that a new section 1391(c) was adopted in 1988 which changed the requirement to 'any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C.A. §1391(c), as amended by Act of Nov. 19, 1988, Pub.L. 100-702, §1013, 102 Stat.4624, 4669. And, this Court does not agree with the test proposed by SABIC of "doing business" for reasons well-articulated by Wright, Miller and Cooper:

> The licensing standard that the First Circuit chose . . . has literally nothing to do with place of suit or protection against an inconvenient forum. The rules on when a state may require a foreign corporation to qualify if it wishes to do business there are derived from the Commerce Clause. One of the consequences of the licensing standard the First Circuit has adopted is that a corporation will never be found to be 'doing business' for purposes of § 1391(c) it is doing a wholly interstate business within the state. This will prevent § 1391(c) from being used in many cases involving extensive activity by a corporation within the district.

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15 Federal Practice and Procedure, § 3811 at 121 (footnotes omitted).

This Court finds that the business activity described by Exxon is sufficient to meet the "doing business" requirement under § 1391(f). Additionally, because SABIC chose to litigate NJ-I here, the "underlying venue principles of fairness and convenience" are served by retaining venue in the matter. Eason v. Linden Avionics, Inc., 706 F.Supp. 311, 327 (D.N.J. 1989).

Venue is proper in this district; this Court has jurisdiction over SABIC. SABIC's motions to dismiss based on a lack of subject matter jurisdiction, personal jurisdiction and improper venue are denied).[15] Exxon's separate motion for discovery to establish the jurisdictional issues has been rendered moot.

D. Abstention

SABIC next argues that under the abstention doctrine to avoid concurrent litigation, this Court should abstain from hearing the NJ-II action because it is allegedly duplicative and wastes judicial resources.

Some background is necessary: SABIC filed the NJ-I action alleging patent misappropriation in this Court in 1998. In July 2000, it filed a lawsuit in Delaware state court involving the same parties, but seeking declaratory relief that the royalty charges to Yanbu and ECAI were proper under the Joint Venture Agreements. Exxon filed the NJ-II action in August 2000, only a few weeks after the Delaware Action, claiming that the royalty charges violated the Joint Venture Agreements by allegedly overcharging Yanbu and ECAI millions of dollars. SABIC's premise for its abstention argument is that these are all different, unrelated lawsuits, and that

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abstention is desirable to allow the Delaware Action to proceed. However, this Court has already found that the claims and defenses in the NJ-I, II and Delaware actions are all part of the same overall agreement, such that they should be heard together.

Nevertheless, SABIC wants this Court to abstain in favor of allowing the Delaware action to proceed for reasons of alleged "sound judicial administration." For the reasons that follow, this Court will not abstain.

1. *Colorado River* Abstention

In Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court held that abstention is justified only when "exceptional" circumstances support a federal district court's decision to abstain out of deference to parallel state-court litigation. Colorado River, 424 U.S. at 818, 96 S.Ct. at 1246. Colorado River and its progeny emphasize that the mere duplicativeness of parallel state and federal litigation is insufficient to justify abstention on the part of a federal district court '"[Generally] . . . the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal Court having jurisdiction."' Id. at 817 (quoting McClellan v. Carland, 217 U.S. 268, 282, 30 S.Ct. 501, 505, 54 L.Ed. 762, 767 (1910)). Rather, "the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under Colorado River to justify the *surrender* of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 25-26, 103 S.Ct. 927, 942, 74 L.Ed.2d 765 (1983).

Colorado River identified four factors a federal court should consider when determining whether to abstain from jurisdiction: (1) whether one court first obtained *in rem* (or *quasi in rem)* jurisdiction over property involved in that

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litigation; (2) "inconvenience of the federal forum"; (3) "desirability of avoiding piecemeal litigation"; and (4) "the order in which jurisdiction is obtained by the concurrent forums." Colorado River, 424 U.S. at 818-819, 96 S.Ct. at 1247. Moses Cone added two additional factors to consider: (1) whether federal or state law applies; and (2) adequacy of state court proceeding. Moses Cone, 460 U.S. at 23-27; 103 S.Ct. at 941-942. In considering these factors: "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly case from case, depending on the particular setting of the case." Id. at 16.

There is no dispute that this matter parallels the action filed in Delaware. Generally, pending actions in state and federal court are "parallel" when the cases involve "the same parties and claims." Ryan v. Johnson, 115 F.3d 193, 196 (3d Cir. 1997). Here the NJ-II and Delaware actions involve the same parties (Yanbu and ECAI), and involve identical claims—adjudication of whether SABIC has overcharged Yanbu and ECAI in their royalty payments, in violation of Art. 6.3 of the respective Joint Venture Agreements and whether SABIC has properly charged KEMYA and YANPET under each of their Unipol sublicenses for the use of Unipol® process. Although NJ-II and the Delaware action are parallel, the Colorado River factors discussed below require this Court not to abstain.

a. Jurisdiction over Property

Neither of the actions involves *in rem* or *quasi in rem* jurisdiction over property; this factor is inapplicable. Allied

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Nut and Bolt, Inc., v. NSS Indus., 920 F.Supp. 626, 631 (E.D. Pa. 1996).

b. Inconvenience of the Forum

SABIC points out that Yanbu is a Delaware corporation and maintains its principal place of business in Wilmington, Delaware. Also, ECAI is a Delaware corporation, with its principal place of business in Texas. According to SABIC, neither Yanbu or ECAI is inconvenienced by the need to litigate in Delaware. Indeed, Delaware was the *only* forum where SABIC could sue both of these parties, because neither was amenable to suit in New Jersey.

Also, Yanbu and ECAI must respond by filing a compulsory counterclaim in Delaware. See Del. Sup. Ct. R. Civ. P. 13 ("[a] pleading shall state as a compulsory counterclaim any claim which at the time of . . . the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ."). Thus, the case is properly in Delaware, says SABIC.

Exxon counters that the New Jersey forum is more convenient than any other forum, including Delaware, because SABIC initiated the NJ-I action here first. Also, SABIC has no connection to Delaware. Exxon is incorporated in New Jersey, and no relevant events took place in Delaware. Further, no witnesses or evidence are found in Delaware. This Court finds that the New Jersey forum is not inconvenient for the parties involved and that this factor weighs in favor of this Court not abstaining.

c. Desirability of Avoiding Piecemeal Litigation

SABIC claims that the desire to avoid piecemeal litigation here warrants abstention. According to SABIC, if both the New Jersey and Delaware actions proceed to litigate the same

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issues between the same parties, there will be needless and wasteful duplication of efforts, and possibly inconsistent rulings: abstention by staying or dismissing the second filed "reactive" suit is appropriate.

"[I]t is evident that the 'avoidance of piecemeal litigation' factor is met . . . only when there is evidence of a strong federal policy that all claims should be tried in state courts." Ryan, 115 F.3d at 197-8; see also, Colorado River, 424 U.S. at 819-20, 96 S.Ct. At 1247-1248. (factor was met with evidence of clear federal policy that recognizes the availability of comprehensive state systems for adjudication of water rights); Moses Cone, 460 U.S. at 19-20; 103 S.Ct. at 939 (factor not met because Federal Arbitration Act did not have clear policy against piecemeal litigation).

This Court finds no clear federal policy here that would give rise to abstention. "The presence of garden-variety state law issues has not, in this circuit, been considered sufficient evidence of congressional policy to consolidate multiple lawsuits for unified resolution in the state courts." Ryan, 115 F.3d at 198. Moreover, because there is another closely-related matter being litigated in this forum (NJ-I), this Court finds that greater judicial economy is served by adjudicating these cases in this forum rather than in Delaware. This Court finds that this factor does not weigh in favor of abstention.

SABIC further argues that circumstances show there is an overriding federal policy to limit piecemeal litigation against foreign states under the FSIA. As discussed, this Court has found that SABIC is not entitled to sovereign immunity under the FSIA. Moreover, even if the FSIA was enacted to protect foreign states like SABIC, there is no indication that the statute demonstrates a preference for state adjudication of claims against foreign states. There are no "exceptional circumstances" favoring abstention with regard to this factor.

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d. Order in Which State and Federal Courts Obtained Jurisdiction

This Court first obtained jurisdiction through SABIC's filing of the NJ-I action in 1998. The Delaware action was filed on July 24, 2000. Pre-trial discovery has begun. The NJ-II action was filed in this Court by Exxon on August 3, 2000.[16] Discovery has not yet taken place. SABIC argues that the filing of the Delaware action before the filing of the matter here gives this Court reason to abstain. SABIC's argument is rejected because the NJ-I action was filed before the Delaware action. This Court finds that this factor weighs against abstention.

e. Source of Law that Governs

The law of Saudi Arabia applies to all of the agreements. (See Compl., ¶ 22). This factor is neutral as to whether the matter should be litigated in New Jersey or in Delaware. See Allied Nut & Bolt, 920 F.Supp. at 632.

f. Adequacy of State Court Proceedings

All of the claims, except Exxon's third-party beneficiary claim are in the Delaware action. Delaware Rule of Civil Procedure 13 requires ECAI and Yanbu to plead all compulsory counterclaims in the Delaware action. SABIC says that the Delaware action is adequate to protect the rights of all parties and to provide complete relief. See Allied Nut and Bolt, 920 F.Supp. at 632. This Court agrees that the state proceedings are adequate.

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[16] SABIC neglects to mention that the overcharge issue was already being litigated in the NJ-I action when SABIC filed the Delaware action. In fact, SABIC had already agreed to a consent order that would have required it to respond to overcharge discovery. Instead of responding, SABIC filed the Delaware Action. (Exxon Br. 25, n. 25).

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2. Conclusion

However, when weighing all of the Colorado River factors, this Court will *not* abstain because it does not find "exceptional circumstances" that would "justify the surrender" of federal jurisdiction. Moses Cone, 460 U.S. at 25-26; 103 S.Ct. at 942. Rather, SABIC essentially argues for this Court's abstention in this case because there are parallel state proceedings. As described, the mere existence of parallel state proceedings does not justify abstention under Colorado River.

E. Third-party Beneficiary Claims

Exxon asserts third-party beneficiary claims on behalf of ECAI, for breach of the Joint Venture Agreement from the alleged royalty overcharges. Exxon claims to be an "intended third-party beneficiary" of these Joint Venture Agreements. (See Compl., ¶ 28). SABIC argues that a parent corporation cannot, as a matter of law, assert third-party beneficiary status arising solely out of a contract between its subsidiary and another person.

A third-party cannot sue under a contract to which it is not a party unless it establishes that the contract was directly "'made (for the benefit of [that] party within the intent and contemplation of the contracting parties.'" Grant v. Coca-Cola Bottling Co., 780 F.Supp. 246 248-49 (D.N.J. 1991) (quoting First Nat'l State Bank of New Jersey v. Commonwealth Fed'l Sav. and Loan Assoc., 610 F.2d 164, 170 (3d Cir. 1980). Without such contractual intent and direct benefit, the third-party is merely an incidental beneficiary lacking standing to sue. Broadway Maint. Corp. v. Rutgers, 90 N.J. 253, 259 (1982). Also, a parent corporation is prohibited from claiming third-party beneficiary status under a contract entered into by its subsidiary. Indeed, such claims are routinely dismissed because the purported "benefit" the parent corporation derives is incidental. See Dow Corning Corp.

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v. Chem. Design, Inc., 3 F.Supp.2d 361, 365-66 (W.D.N.Y. 1998).

SABIC urges that Exxon's claim of third-party beneficiary status be dismissed. Any alleged overcharge of royalties under the Unipol sublicenses would go to the KEMYA and YANPET, not Exxon.

Exxon responds that contrary to SABIC's assertion, it has never alleged that its status as a third-party beneficiary depends, in whole or in part, on its status as the ultimate parent company of either ECAI or Yanbu. Exxon has ***alleged*** that it is a third-party beneficiary of the Joint Venture Agreements; that is sufficient at this stage in the litigation. See Fed. R. Civ. P. 12(b)(6), 8(a). There is no heightened pleading standard for third-party beneficiary claims. Exxon says that the allegation in ¶ 28 of the first amended complaint suffices. This Court agrees.

In addition, Exxon (through its predecessors Exxon and Mobil) was deeply involved in the KEMYA and YANPET ventures since before their inception. While ECAI and Yanbu actually signed the Joint Venture Agreements, Exxon and Mobil representatives were involved in the pre-formation negotiations. Exxon and Mobil signed various agreements annexed to the Joint Venture Agreements, including the Exxon-KEMYA Service Agreement. The Court finds that Exxon may maintain its third-party beneficiary claims.

F. Jury Demand is Stricken

Finally, SABIC argues that if any portion of plaintiffs' complaint survives, the jury demand is barred by 28 U.S.C. §1330, and should be stricken. If jurisdiction is found under Section 1330, the Court's jurisdiction is limited solely to nonjury civil actions. 28 U.S.C. §1330(a). As noted earlier, SABIC is a foreign state, defined by 28 U.S.C. §1603(a) and as plead by plaintiffs. (Compl., ¶ 5).

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Whenever a plaintiff asserts jurisdiction under Section 1330 and simultaneously makes a demand for jury trial, courts *uniformly* grant motions to strike jury demands. Universal Consol. Cos., Inc. v. Bank of China, 35 F.3d 243, 245 (6th Cir. 1994). The jury demand is stricken because of Section 1330 jurisdiction.

5. MOTION TO CONSOLIDATE NJ-I AND NJ-II

Exxon moves to consolidate the NJ-I and NJ-II actions. This Court has already determined that alleged breaches by SABIC and Exxon were based on an "overall agreement" that links all three actions (NJ-I, NJ-II, Delaware Action).

> Fed. R. Civ. P. 42 provides:
>
> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Courts in this district have held that Rule 42 does not "demand that actions be identical before they may be consolidated." In re Cendant Corp. Litig., 182 F.R.D. 476, 478 (D.N.J. 1998). Rule 42 only requires a "common question of law or fact." Id.; see also 8 Moore's Federal Practice, § 42.10 at 42-8 (Matthew Bender, 3d. ed. 1997) ("[t]he articulated standard for consolidating two or more cases is simply that they involve a 'common question of law or fact.'") "Common questions of law and fact do not have to predominate." Id. at §42.10.

The Court enjoys broad discretion in determining whether to consolidate under Rule 42. See, e.g., Blake v. Farrell Lines, Inc., 417 F.2d 264, 266 (3d Cir. 1969) (affirming consolidation even where overlapping facts resulted in jury trial as to

issues of equity). In exercising this discretion, a court should weigh "the interests of judicial economy against the potential for new delays, expense, confusion or prejudice." Easton & Co. v. Mutual Benefit Life Ins. Co., 1992 WL 448794, at *4 (D.N.J. Nov. 4, 1992).

This Court exercises its discretion and consolidates the NJ-I and II actions. This Court has already held that the NJ-I and II actions arise from the overall Joint Venture Agreement that included the Service Agreement and the Unipol Agreement, the subject of the NJ-I and NJ-II actions respectively. Common questions of law and fact predominate. The interests of judicial economy and avoidance of potential confusion and prejudice favor consolidation.

CONCLUSION

With respect to the NJ-I motions, the motion for clarification or reformation of the March 10 Stipulation and the motion for partial judgment on the pleadings to strike Exxon's unclean hands and setoff defenses are denied. Exxon's cross-motion to dismiss pursuant to Rule 19 is denied; SABIC is not required to join either ECAI or KEMYA because they are not indispensable parties.

With respect to the NJ-II motions, SABIC is not entitled to immunity under FSIA because of its implied waiver to immunity. In addition, the "commercial activity" exception to immunity applies because SABIC's activities had a "direct effect" in the United States pursuant to 28 U.S.C. 1605(a)(2). This Court has determined that personal jurisdiction exists because of SABIC's consent to personal jurisdiction and its minimum contacts with this jurisdiction. There is sufficient evidence that SABIC was "doing business" in New Jersey and therefore, venue is proper in this District.

Abstention is denied under Colorado River because the balance of factors does not meet the exceptional circumstances standard to defeat federal jurisdiction. SABIC's motion to dismiss Exxon's claim of third-party beneficiary status is denied. The jury demand is stricken because SABIC is a foreign sovereign. Finally, the NJ-I and II actions are consolidated.

2 April 2002
Date
/s/ William H. Walls
William H. Walls, U.S.D.J.

FOR PUBLICATION

Civil Action No. 98-4897 (WHW)

SAUDI BASIC INDUSTRIES CORPORATION, INDIVIDUALLY AND IN THE NAME OF, AND ON BEHALF OF, AL-JUBAIL PETROCHEMICAL COMPANY, A PARTNERSHIP,
Plaintiff,

v.

EXXONMOBIL CORPORATION,
Defendant.

Civil Action No. 00-3841 (WHW)

EXXONMOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., and MOBIL YANBU PETROCHEMICAL COMPANY, INC.
Plaintiffs,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Defendant.

ORDER

Walls, District Judge

This dispute concerns the alleged misuse of a patent and alleged overcharges of royalties to a partnership. In Civil Action No. 98-4897(WHW) ("NJ-I"), Plaintiff Saudi Basic Industries ("SABIC") moves to clarify or reform a March 10, 2000 Stipulation and moves pursuant to Rule 12(c) for partial judgment on the pleadings to strike Defendant ExxonMobil's

FOR PUBLICATION

("Exxon") defenses of unclean hands and set-off. Exxon cross-moves to dismiss the complaint pursuant to Rule 19 for SABIC's failure to join necessary and indispensable parties.

In Civil Action No. 00-3841 (WHW) ("NJ-II"), Defendant SABIC moves to dismiss the complaint based on immunity under the Foreign Sovereign Immunities Act, as well as on other jurisdictional grounds. Also, Defendant SABIC moves to dismiss ExxonMobil as a party plaintiff because of lack of standing to assert third-party beneficiary claims and moves to strike the jury demand because of this Court's jurisdiction under 23 U.S.C. §1330. Plaintiffs Exxon, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. move to consolidate the NJ-I and NJ-II actions into a single lawsuit.

For the reasons given in the accompanying Opinion, and for good cause shown,

It is on this 2nd day of April, 2002:

ORDERED that the motion for clarification or reformation of the March 10 Stipulation is denied;

IT IS FURTHER ORDERED that the motion for partial judgment on the pleadings pursuant to Rule 12(c) is also denied;

IT IS FURTHER ORDERED that Exxon's cross-motion to dismiss pursuant to Rule 19 is denied;

IT IS FURTHER ORDERED that SABIC's motion to dismiss for lack of jurisdiction and venue is denied;

IT IS FURTHER ORDERED that SABIC's motion to dismiss Exxon's claim of third-party beneficiary status is denied;

IT IS FURTHER ORDERED that the jury demand be stricken;

FOR PUBLICATION

IT IS FURTHER ORDERED that Exxon's motion to consolidate is granted.

/s/ William H. Walls
William H. Walls, U.S.D.J.

FOR PUBLICATION

APPEARANCES

Plaintiff/Cross Defendant (SABIC)

Jeffrey E. Lorell
Saiber, Schlesinger, Satz & Goldstein, LLC
One Gateway Center
Newark, NJ 07102

Kenneth R. Adamo
Michael W. Vary
Leozino Agozzino
Jones, Day, Reavis & Pogue
North Point
901 Lakeside Ave.
Cleveland, OH 44114

Cheryl L. Farine
Hudak & Shunk Co., L.P.A.
7 West Bowery Street, Suite 808
Akron, OH 44308

Defendant/Cross Plaintiff (ExxonMobil)

Elizabeth Sher
Pitney, Hardin, Kipp & Szuch, LLP
P.O. Box 1945
Morristown, NJ 07962

James Quinn
Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, NY 10153

Hahn, Loeser & Parks, LLP
3300 BP Tower
200 Public Square
Cleveland, OH 44114-2301

K.C. Johnson
ExxonMobil Corporation
800 Bell Street, Suite 1686J
Houston, TX 77002

APPENDIX D

IN THE SUPERIOR COURT OF
THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

C.A. No. 00C-07-161-JRJ

SAUDI BASIC INDUSTRIES CORPORATION,
Plaintiff,

v.

MOBIL YANBU PETROCHEMICAL COMPANY, INC.
and EXXON CHEMICAL ARABIA, INC.,
Defendants.

Submitted: December 19, 2002
Decided: January 24, 2003

OPINION

*Upon Defendants' Motion to Realign the Order of Proof for Trial Presentation—**GRANTED.***

Donald E. Reid, Esquire, Morris, Nichols, Arsht & Tunnell, 1201 North Market Street, P.O. Box 1347, Wilmington, Delaware 19899, Kenneth R. Adamo, Esquire, Michael W. Vary, Esquire and Leozino Agozzino, Esquire, Jones, Day, Reavis & Pogue, North Point, 901 Lakeside Avenue, Cleveland, Ohio 22114, Jeffrey W. Lorell, Esquire and Marc C. Singer, Esquire, Saiber, Schlesinger, Satz & Goldstein, LLC, One Gateway Center, 13th Floor, Newark, New Jersey 07102 and Cheryl L. Farine, Esquire, Hudak, Shunk & Farine Co., L.P.A., 2020 Front Street, Suite 307, Cuyahoga Falls, Ohio, 44221, for Plaintiff. William J. Wade, Esquire, Richards, Layton & Finger, One Rodney Square, P.O. Box 551, Wilmington, Delaware 19899, James W. Quinn, Esquire and David Lender, Esquire, Weil, Gotshal & Manges, LLP, 767 Fifth Avenue, New York, New York 10153, K.C. Johnson, Esquire, Exxon Mobil Corporation, 800 Bell Street, Suite 1686J, Houston, Texas 77002, for Defendants.

JURDEN, J.

INTRODUCTION/BACKGROUND

The issue before this Court in the instant motion is whether or not, in view of the facts of this case and the recognized rules of law and practice, realignment of the order of proof is appropriate.

In simple terms, the main issue in this case is whether SABIC breached certain agreements with Mobil Yanbu Petrochemical Company, Inc. and Exxon Chemical Arabia, Inc. (collectively, "ExxonMobil") by overcharging YANPET and KEMYA (The "Joint Ventures") for their use of Unipol® technology.[1] The Court will not recite the facts underlying this dispute; they are amply set forth in the voluminous pleadings, and memoranda filed in support of this motion and the outstanding summary judgment motions.

However, the procedural history leading up to this motion is critical to its determination. On July 24, 2000, the plaintiff, Saudi Basic Industries Corp. ("SABIC") filed a declaratory

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[1] *See Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F. Supp. 2d 378, 385 (D.N.J. 2002). As Judge Walls noted: "SABIC's complaint seeks declaratory relief . . . solely on the issue of whether the royalty charges were proper under the joint venture agreements." *Id.*

judgment action against ExxonMobil in this Court. This filing occurred one business day after the conclusion of media tion in a related case, pending in the United States District Court for the District of New Jersey. ExxonMobil alleges that SABIC wrongfully used information gleaned during that mediation, or settlement discussions, in violation of the parties express agreements, to file this suit "in a blatant attempt to gain a tactical advantage."[2] In short, ExxonMobil accuses SABIC of forum shopping in an effort to "avoid having the trier of fact in New Jersey hear about . . . [SABIC's] improper overcharges . . . ."[3]

In response to SABIC's declaratory judgment action, ExxonMobil filed counterclaims based on the alleged overcharges by SABIC including, *inter alia*, claims for breach of contract, breach of fiduciary duty, unjust enrichment and promissory estoppel. In the motion presently before this Court, ExxonMobil asks the Court to "realign" the order of proof for trial presentation because ExxonMobil "bears the burden of proof on the ultimate issue for trial, and because realignment in this instance promotes the conservation of judicial resources and lessens jury confusion."[4]

DISCUSSION

The parties agree that the trial judge has discretion in determining whether or not to depart from the usual order of

[2] Def.'s Mem. Law Supp. Mot. Realign Order Proof Trial Presentation at 3 [hereinafter Def.'s Mem. Law].

[3] *Id.* at 3, n.4.

[4] Def.'s Mem. Law at 5.

proof at trial.[5] That discretion is broad.[6] According to Delaware Uniform Rule of Evidence 611(a),

> *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, and (2) avoid needless consumption of time.[7]

ExxonMobil's concerns about conserving judicial resources and lessening jury confusion are well grounded. Having presided over this complicated dispute for over 15 months, and having become very familiar with the salient facts and issues through numerous, hotly contested discovery disputes and extensive motion practice, the Court firmly believes that realignment of the order of proof in this case would (a) result in a far more effective presentation "for the ascertainment of the truth," (b) "avoid needless consumption of time,"[8] and (c) reduce the potential for juror confusion. ExxonMobil argues that, "although SABIC is technically the plaintiff by virtue of winning its race to the courthouse, SABIC's Amended Complaint is merely a compilation of defenses."[9] ExxonMobil correctly points out that:

[5] Hr'g. Tr. (Dec. 19, 2002) at 115, 119.

[6] *See Tice v. State*, 624 A.2d 399,403 (Del. 1993); *Brothers v. McKay*, 544 A.2d 265, 265 (Del. 1988); *Gaston v. State* 234 A.2d 324, 325 (Del. 1967); *Baltimore & O. R.. Co. v. Hawke*, 143 A. 27, 31 (Del. 1928).

[7] DEL. UNIF. R. EVID. 611(a).

[8] *See* DEL. UNIF. R. EVID. 611(a).

[9] Def.'s Mem. Law at 7.

> [r]egardless of what the caption reads, SABIC is in the position of traditional defendant, asserting that it acted correctly. ExxonMobil, on the other hand, is in the position of traditional plaintiff, asserting the affirmative position that SABIC caused it harm by improperly overcharging the joint ventures, and that SABIC is liable for damages for its misconduct.[10]

In reality, SABIC is a "nominal" plaintiff; there is no question that the ultimate issue to be decided by the jury is whether SABIC overcharged the joint ventures. There is also no question that ExxonMobil bears the burden of proof with respect to this ultimate issue.

ExxonMobil further argues that "given the facts surrounding SABIC's filing, allowing it to have the benefits of being the plaintiff without the attendant burdens is grossly unfair."[11] Clearly, SABIC did win the race to the Courthouse,[12] and, in doing so, selected the forum in which it desired to have the overcharge issue decided. It is also clear, based on SABIC's actions, that it did not want the New Jersey District Court to decide the overcharge issue.[13] Given what transpired prior to the filing of this suit, the Court can only conclude that SABIC engaged in preemptive forum shopping when it

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[10] *Id.*

[11] Def.'s Mem. Law at 10.

[12] SABIC filed suit here just ten (10) days before ExxonMobil filed suit in New Jersey District Court on the same overcharge issue.

[13] SABIC argued to the New Jersey District Court that it should abstain from deciding the overcharge claims because SABIC filed this action before ExxonMobil filed the overcharge claims there.

decided to file a declaratory judgment action in the Delaware Superior Court rather than litigate this issue as a defendant in the New Jersey District Court. That being the case, the Court notes that:

> . . . the use of the device of declaratory judgment to anticipate and soften the impact of an imminent suit elsewhere concerning long past dealings between the parties for the purpose of gaining an affirmative judgment in a favorable forum requires a closer look at the deference historically accorded a plaintiff's choice of forum.[14]

While the Court is historically reluctant to deprive a plaintiff of its choice of forum, it is not reluctant to accord less deference to that choice when there is "jockeying for position" by "resort to declaratory judgment for the purpose of defensively establishing priority as to forum."[15] Similarly, the Court is not reluctant to realign the order of proof where a party resorts to a preemptive strike via declaratory judgment for the purpose of securing priority as to forum, when realignment makes clear the true posture of the case.[16]

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[14] *Air Products and Chemicals, Inc. v. The Lummus Co.*, 252 A.2d 545, 547 (Del. Ch. 1968) *rev'd on other grounds*, 252 A.2d 543 (Del. 1969).

[15] *Id.*

[16] *See BASF Corp. v. Symington*, 50 F.3d 555, 557 (8th Cir. 1995) (realigning the parties to reflect actual controversy where plaintiff (BASF) filed declaratory judgment on statute of limitations, but defendant "claims injury by BASF, and is therefore the natural plaintiff"); *St. Paul Mercury Ins. Co. v. Lexington, Ins. Co.*, 888 F. Supp. 1372, 1376 (S.D. Tex. 1995) (realigning parties "to better represent the real claims and interests in the case."). *See also Schwendiman Partners, LLC v. Hurt*, 71 F. Supp. 2d 983,

Under the circumstances presented, the Court is compelled to look beyond the pleadings and allocate the burden of proof to the party that must prove the ultimate issue at trial, ExxonMobil.[17]

In its opposition to realignment, SABIC argues that changing the "ordinary order of proofs would be [grossly] unfair to SABIC."[18] The Court does not agree. The Court's obligation is to exercise "reasonable control" over the presentation of evidence "so as to . . . make the presentation effective for the ascertainment of truth . . . ."[19] Under the circumstances presented, there will be no unfairness to SABIC by realigning the order of proof to place the burden of proving the ultimate issue on the party it belongs, thereby making it easier for the jury to understand the presentation of evidence.

CONCLUSION

In the Court's view, proceeding with the order of proof in this manner will promote efficiency, conserve the parties' and

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988 n.4 (D. Neb. 1999) ("In determining the propriety of a declaratory judgment action in circumstances like those presented in this case, the court will realign the parties to reflect the actual controversy underlying the action and determine who is the natural plaintiff.") (citation and quotation omitted).

[17] *See City of Indianapolis v. Chase Nat'l Bank of the City of New York*, 314 U.S. 63, 69 (1941); *Philips v. Liberty Mutual Ins. Co.*, 235 A.2d 835 (Del. 1967); *Bluth v. Bellow*, 1987 WL 9369 (Del. Ch.); *Lutz v. Boas*, 171 A.2d 381, 383 (Del. Ch. 1961).

[18] Pl.'s Br. Opp'n Def.'s Mot. Realign Order Proof Trial Presentation at 10.

[19] DEL. UNIF. R. EVID. 611(a).

the Court's resources, insure the orderly and clear presentation of the evidence, and reduce juror confusion.

For all these reasons, the Defendants' Motion to Realign the Order of Proof for Trial Presentation is **GRANTED**.

/s/ Jan R. Jurden
Jan R. Jurden, Judge

(2)

Supreme Court, U.S.
FILED
JUL 22 2004
OFFICE OF THE CLERK

No. 03-1696

IN THE

Supreme Court of the United States

EXXONMOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC. AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,

Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH R. ADAMO
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

GREGORY A. CASTANIAS
(*Counsel of Record*)
LAWRENCE D. ROSENBERG
JACK W. CAMPBELL IV
WILLIAM K. SHIREY II
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the court of appeals properly dismissed Petitioners' federal action pursuant to the *Rooker-Feldman* doctrine when: (i) the federal action presents claims identical to ones already litigated to final judgment in the Delaware Superior Court; and (ii) Petitioners admit that the federal action is an "insurance policy" they will pursue only if they need to challenge a Delaware Supreme Court ruling reversing the Delaware Superior Court's final judgment for Petitioners.

CORPORATE DISCLOSURE STATEMENT

Respondent Saudi Basic Industries Corporation ("SABIC") is a Saudi Arabian corporation that is owned 70% by the Saudi government and 30% by private investors. SABIC has no parent corporations, and no publicly held corporation owns 10% or more of SABIC's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

The *Rooker-Feldman* doctrine prohibits parties from seeking appellate review of a state-court judgment in a United States district court. Such review is incompatible with 28 U.S.C. § 1257's grant of exclusive federal appellate jurisdiction over state-court decisions to this Court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). In this case, the Third Circuit held that the *Rooker-Feldman* doctrine bars Petitioners from maintaining a federal action when: (i) the federal action presents claims identical to ones already litigated to final judgment in the Delaware Superior Court; and (ii) Petitioners admit that their federal action is an "insurance policy" they will pursue only if they need to challenge a Delaware Supreme Court judgment reversing a Delaware Superior Court judgment in Petitioners' favor. The Third Circuit's application of the *Rooker-Feldman* doctrine to put a stop to Petitioners' admitted gamesmanship was entirely proper.

Petitioners attempt to concoct circuit splits by mischaracterizing both the nature and scope of the straightforward decision below. Moreover, even if this Court desires someday to elucidate whatever differences may exist between the *Rooker-Feldman* doctrine and res judicata principles, this case is a singularly poor vehicle for doing so. The decision below was narrow and factbound; Petitioners did not raise their question presented before the Third Circuit; and the result in this case is the same whether analyzed under the *Rooker-Feldman* doctrine or under res judicata principles. The petition should be denied.

STATEMENT OF THE CASE

This case involves allegations that Respondent, Saudi Basic Industries Corporation ("SABIC"), overcharged two SABIC-ExxonMobil joint ventures for certain technology used in the production of polyethylene. SABIC and Petitioners have already litigated the identical claims raised

in this federal court action to a $416.8 million final judgment for Petitioners in the Delaware Superior Court. SABIC has appealed that judgment to the Delaware Supreme Court, where briefing and oral argument are complete and a decision is pending. The Third Circuit dismissed Petitioners' federal action for lack of subject-matter jurisdiction pursuant to the *Rooker-Feldman* doctrine. (Pet. App. 6a, 8a) The Third Circuit reached this result because Petitioners admitted that their federal and Delaware suits raise "identical" claims, that their federal suit is "an insurance policy" to be pursued only if the Delaware Supreme Court reverses the $416.8 million judgment, and (if SABIC is unsuccessful at obtaining a reversal in Delaware) that they will dismiss their federal suit once SABIC has exhausted its appellate rights in Delaware.

1. In 1980, SABIC and two corporations that are now wholly-owned ExxonMobil subsidiaries formed two separate joint ventures to produce polyethylene in the Kingdom of Saudi Arabia. SABIC, which was then wholly-owned, and is now 70% owned, by the Saudi Arabian government, entered into these joint ventures pursuant to a Saudi government mandate to help industrialize the Kingdom by attracting capital investment and technological know-how from foreign corporations. The first of these two joint ventures – Yanpet – was formed on April 19, 1980 when SABIC and Mobil-Yanbu executed a joint-venture agreement. The other – Al-Jubail Petrochemical Co, or Kemya – was formed on April 26, 1980 when SABIC and Exxon Chemical Arabia executed a nearly identical joint-venture agreement.

2. In 1998, SABIC brought unrelated claims of patent misappropriation against ExxonMobil in the United States District Court for the District of New Jersey. In mid-2000, during discovery in that dispute, ExxonMobil first alleged that SABIC had breached a provision of the joint-venture agreements. ExxonMobil claimed that, starting in 1980, SABIC provided certain technology for the production of polyethylene to the joint ventures and charged them a margin

above SABIC's costs. ExxonMobil asserted that the joint-venture agreements required any technology provided by a partner to the joint ventures had to be provided at cost.

3. On July 24, 2000, SABIC filed a declaratory judgment action against the ExxonMobil subsidiaries in the Delaware Superior Court. Both ExxonMobil subsidiaries are Delaware corporations, and Delaware was the only state where SABIC could ensure that it obtained personal jurisdiction over them. SABIC sought declarations that: (1) the relevant provisions of the joint-venture agreements do not apply to the polyethylene technology in question; (2) ExxonMobil's overcharge allegations are time barred; and/or (3) SABIC had not overcharged the joint ventures. In early 2002, Petitioners asserted damage claims for breach of contract and "usurpation" under Saudi Arabian law as counterclaims in the Delaware action.

4.a. On August 8, 2000, Petitioners filed this case in the United States District Court for the District of New Jersey based upon, as Petitioners put it, the "identical claims" that form the basis of the Delaware action. (Pet. 20) Petitioners sought damages for SABIC's alleged breach of the joint-venture agreements.

b. SABIC moved to dismiss ExxonMobil's federal suit based on, *inter alia*, SABIC's status as a foreign sovereign commercial instrumentality entitled to immunity from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA"). (Pet. App. 45a-46a, 49a) On April 22, 2002, SABIC filed an interlocutory appeal to the Third Circuit to challenge the district court's ruling denying SABIC immunity under the FSIA. (Pet. App. 4a) The district court stayed proceedings pending resolution of the appeal.

c. With the Third Circuit appeal pending, the parties jointly agreed to proceed to trial in the Delaware Superior Court. ExxonMobil moved to be treated as the plaintiff in the Delaware action and thus to present its damage

counterclaims first at trial. The Delaware court agreed and, after a two-week trial, a jury returned general verdicts on ExxonMobil's claims totaling $416.8 million. (Pet. App. 4a) After the Delaware Superior Court rejected SABIC's post-trial motions, the judgment became final in September 2003. On October 1, 2003, SABIC noticed its appeal to the Delaware Supreme Court. (*Id.*)

5.a. On December 9, 2003, the Third Circuit heard argument in SABIC's interlocutory appeal. Pursuant to the court's pre-argument instructions, the parties specifically addressed the question whether the Delaware final judgment stripped the federal court of jurisdiction under the *Rooker-Feldman* doctrine. During argument, the court expressly asked Petitioners' counsel to explain their continued pursuit of the federal action:

> THE COURT: But I guess you're not too unhappy so far in Delaware?
>
> MR. QUINN: So far so good. So far so good, but knock on wood, you never know, because anything could happen. We feel pretty good about it, but --
>
> THE COURT: So New Jersey is an insurance policy?
>
> MR. QUINN: In a way it is. . . .

(Tr. Oral Arg. 28-29 (docketed 12/18/03))

Petitioners' counsel also admitted that, if SABIC loses the Delaware appeal, "there really would be nothing left to do except dismiss the New Jersey case" because Petitioners "can only collect $417 million once." (Tr. Oral Arg. 27)

b. On March 24, 2004, after receiving supplemental briefing from both parties, the Third Circuit vacated the district court's decision and remanded the case "with instruction to dismiss th[e] action for lack of subject matter jurisdiction." (Pet. App. 8a) The court relied on the well-established *Rooker-Feldman* doctrine, which provides that "lower federal courts lack the power to decide claims in which 'the relief requested . . . requires determining that the

state court's decision is wrong or . . . void[ing] the state court's ruling.'" (Pet. App. 5a (citations omitted)) The Third Circuit explained that "'a claim is barred by *Rooker-Feldman* under two circumstances: first, if the claim was 'actually litigated' in state court prior to filing of the federal action or, second, if the claim is 'inextricably intertwined with [the] state adjudication.'" (*Id.* (citations omitted)) Applying this standard, the court held:

> [b]ecause ExxonMobil's federal claims were identical to the claims in which the Delaware Superior Court reached a final judgment, they are barred by the *Rooker-Feldman* doctrine. Even within our Court's narrow confines for *Rooker-Feldman*, this case is easily cabined. We cannot imagine a more classic invocation of the *Rooker-Feldman* jurisdictional bar than to preclude a party from maintaining a federal action as an "insurance policy" in case the state trial court decision in that party's favor is overturned by an appellate state court.

(Pet. App. 8a)

c. Petitioners did not seek rehearing or rehearing en banc. They filed a petition for certiorari on June 22, 2004.

REASONS FOR DENYING THE PETITION

I. PETITIONERS MISCHARACTERIZE THE NATURE AND SCOPE OF THE DECISION BELOW IN AN UNSUCCESSFUL EFFORT TO MANUFACTURE A MATERIAL CONFLICT WITH OTHER CIRCUITS

Petitioners attempt to concoct a material conflict with other circuits by offering three mischaracterizations of the decision below. *First*, Petitioners assert that the Third Circuit's decision "replaces th[e] waivable affirmative defense" of res judicata with the "nonwaivable jurisdictional bar" of the *Rooker-Feldman* doctrine. (Pet. 7) *Second*, Petitioners contend that the decision below "eviscerates the

well-established principle that concurrent jurisdiction may permit overlapping and even identical claims to proceed in parallel in state and federal courts." (*Id.*) *Third*, Petitioners claim that "the Third Circuit's reformulation of *Rooker-Feldman* promotes gamesmanship and forum shopping." (Pet. 22) None of these assertions (which were not even raised below, *see infra* Section II(B)) withstands even cursory scrutiny.

1. Turning to Petitioners' first contention, the decision below did not "transmute[] *Rooker-Feldman* into a doctrine that encompasses all claims that may fall within the scope of ordinary preclusion principles." (Pet. 9) The Third Circuit twice emphasized its "narrow view of the *Rooker-Feldman* doctrine." (Pet. App. 6a; *id.* at 8a) Indeed, the Third Circuit has expressly adopted the view that the *Rooker-Feldman* doctrine and res judicata are "distinct" and "not coextensive." *Parkview Assocs. P'ship v. City of Lebanon*, 225 F.3d 321, 328-29 (3d Cir. 2000) (citing *GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993)). In other words, if there is any split among the circuits on this issue, the Third Circuit falls squarely on the side that Petitioners assert is the "correct" side – *i.e.*, that the two doctrines are "not coextensive."[1]

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[1] Petitioners' implication that res judicata is only a waivable affirmative defense is also wrong. Indeed, this Court has recognized that federal courts may invoke res judicata *sua sponte*, even on appeal, to dismiss a federal suit. "This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *Arizona v. California*, 530 U.S. 392, 4112 (2000); *accord, e.g., Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir. 1993); *Hutcherson v. Lauderdale County, Tenn.*, 326 F.3d 747, 756-57 (6th Cir. 2003); *Studio Art Theatre of Evansville, Inc. v. City of Evansville*, 76 F.3d 128, 130 (7th Cir. 1996); *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir. 1997); *McClain v. Apodaca*, 793 F.2d 1031, 1032-33 (9th Cir. 1986); *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1274, 1278 (10th Cir. 1989); *Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1997).

In this case, the Third Circuit simply held that the *Rooker-Feldman* doctrine prohibits Petitioners from maintaining a federal action that presents claims "identical" to those they litigated to final judgment in the Delaware Superior Court, especially given Petitioners' admission that they are doing so as an "insurance policy" to be pursued if, and only if, they need to challenge a Delaware Supreme Court judgment reversing the Delaware Superior Court. (Pet. App. 8a) On its face, this holding does not conflate the *Rooker-Feldman* doctrine and res judicata. Res judicata "prohibits reexamination not only of matters actually decided in the prior case, *but also those that the parties might have, but did not, assert in that action*." *Parkview Assocs.*, 225 F.3d at 329 n.2 (emphasis added).

In contrast, the Third Circuit's holding here was limited to prohibiting readjudication of "identical" claims, a result entirely consistent with this Court's view that "to sue in federal trial court in order to readjudicate the very same issues that were determined in . . . state-court proceedings below . . . would be an attempt to obtain direct review of the [state court's] decision in the lower federal courts, and would represent a partial inroad on *Rooker-Feldman*'s construction of 28 U.S.C. § 1257." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989). Courts of appeals on both sides of Petitioners' supposed "split" hew to the same line. *See, e.g., American Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 317 (4th Cir. 2003) ("*Rooker-Feldman* generally applies when a state-court litigant sues in federal district court to readjudicate the same issues decided in the state court proceedings."); *Kenmen Eng'g v. City of Union*, 314 F.3d

468, 473 (10th Cir. 2002) ("*Rooker-Feldman* doctrine prohibits a lower federal court from considering claims actually decided by a state court . . . ."); *Centres, Inc. v. Town of Brookfield, Wis.*, 148 F.3d 699, 703 (7th Cir. 1998) (*Rooker-Feldman* applies where federal litigant presents no "independent claim"); *Moccio v. N.Y. State Office of Court Admin.*, 95 F.3d 195, 198-99 (2d Cir. 1996) ("If the precise claims raised in a state court proceeding are raised in the subsequent federal proceeding, *Rooker-Feldman* plainly will bar the action.").

2. Equally misplaced is Petitioners' claim that the decision below "eviscerates the well-established principle that concurrent jurisdiction may permit overlapping and even identical claims to proceed in parallel" in state and federal courts. (Pet. 7) The decision below does nothing of the kind. The Third Circuit merely held that when the state court reaches a final judgment on the merits first, the federal court is *then* barred from further consideration of the identical issues, at least where the federal action is being maintained, admittedly, for the sole purpose of providing an "insurance policy" against an unfavorable judgment by a state appellate court. This is fully consistent with the principles of *Rooker-Feldman* because, were the federal district court to also proceed to a final judgment on the identical claims, its judgment would operate in effect as an appellate *de novo* review of the state court's judgment. Moreover, as a matter of both judicial efficiency and federal-state comity, it makes no sense whatsoever to have both a state and then a federal court render final judgments on identical claims between the same parties, and Petitioners themselves tellingly offer no argument to the contrary.

Hence, Petitioners' attempt (Pet. 13-14) to manufacture a split between the decision below and the Ninth Circuit's decision in *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003), fails. Petitioners rely on *Noel* for the proposition that "*Rooker-Feldman* did not apply to prevent Noel from pursuing identical claims simultaneously in federal and pending state

proceedings." (Pet. 14) This is beside the point. The Third Circuit's decision below is entirely consistent with this holding of *Noel*. In *Noel*, there was no state court final judgment; both the federal and state proceedings were pending. *Noel*, 341 F.3d at 1165. Here, by contrast, the state court has reached a final judgment on the identical claims that Petitioners are pursuing in their federal action.[2]

Petitioners' attempt to manufacture a split with the Fourth Circuit's decision in *Vulcan Chemical Technologies, Inc. v. Barker*, 297 F.3d 332 (4th Cir. 2002), on the permissibility of "parallel" state and federal litigation, is likewise futile. In *Vulcan*, the court did "*not reach* [the] *Rooker-Feldman* argument." *Id.* at 338 (emphasis added). Instead, stressing the "unusual circumstances of th[e] case, in which a state court had entered judgment on the exact issue to be considered by the federal court before the federal court had even heard argument in the case," the Fourth Circuit dismissed the federal suit under the *Colorado River* abstention doctrine. *Id.* at 343-44. Indeed, to the extent that *Vulcan* is instructive at all, it begs the question why Petitioners are complaining about dismissal of their federal action. Petitioners concede (Pet. 21) that their case "likely" should be dismissed on abstention grounds – a result that would accord with *Vulcan*. Petitioners offer no explanation why this Court should review a case dismissed on *Rooker-Feldman* grounds that they concede could have as easily been dismissed on abstention grounds.

3. Lastly, Petitioners argue that "the Third Circuit's reformulation of *Rooker-Feldman* promotes gamesmanship and forum shopping." (Pet. 22) As they see it, "[a] defendant who is sued in federal district court in the Third

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[2] Petitioners concede that "the fact that the Delaware trial court's decision is pending on appeal" does not prohibit application of the *Rooker-Feldman* doctrine. (Pet. 18)

Circuit – or any circuit that adopts the Third Circuit's *Rooker-Feldman* approach – can now defeat federal jurisdiction simply by filing a suit (*e.g.*, a declaratory judgment action) raising identical issues in state court." (*Id.* (footnote omitted)) This argument is absurd. For one thing, it ignores Petitioners' own "gamesmanship" in maintaining this federal action as an "insurance policy" in the event that they are moved to challenge an adverse judgment by the Delaware Supreme Court. A clearer case of forum shopping is difficult to imagine. For another, it ignores the fact that the mere filing of a federal action does not eliminate jurisdiction under the decision below; only a state-court final judgment does, at least where the federal action is admittedly intended only to serve as an "insurance policy" against a state appellate court's reversal of a favorable judgment.

II. THIS CASE IS A POOR VEHICLE FOR EXPLORING WHATEVER DISTINCTIONS MAY EXIST BETWEEN THE *ROOKER-FELDMAN* DOCTRINE AND RES JUDICATA PRINCIPLES

A. The Third Circuit's Decision Was Narrow, Factbound, And Entirely Consistent With The *Rooker-Feldman* Doctrine

As explained above, Petitioners have presented a highly exaggerated and misleading picture of what the Third Circuit really held in this case. In fact, they ultimately admit (Pet. 17-18) that their complaint boils down to a disagreement with the way the Third Circuit applied the *Rooker-Feldman* doctrine on a set of unusual facts. But this Court does not grant certiorari to resolve factbound applications of legal standards. *See, e.g.*, *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320-21 (1994); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993). No exception is warranted here.

The Third Circuit's decision is on its face a narrow, factbound application of the *Rooker-Feldman* doctrine. As the Third Circuit noted, Petitioners' federal action does not

present claims that are merely similar, or related, to claims they have pursued to final judgment in Delaware: "[T]here is no dispute that [Petitioners'] claims are *identical to* the claims upon which the Delaware Superior Court reached a final judgment." (Pet. App. 6a (emphasis added)) Moreover, Petitioners admitted at oral argument (though this admission is tellingly absent from their petition) that they seek "to maintain [their] federal action as an '*insurance policy*' in order to relitigate the overcharge issue if SABIC prevails in its efforts to overturn the state court verdict . . . ." (Pet. App. 8a (emphasis added)) In other words, Petitioners' avowed and *only* purpose for maintaining their federal action is as a vehicle to overturn any adverse judgment that the Delaware Supreme Court might issue.

On these unusual facts, which are unlikely to recur with any frequency, the Third Circuit's decision to employ the *Rooker-Feldman* doctrine to stop Petitioners from gaming the system is unremarkable. In fact, in the only other case presenting similar facts, the Fourth Circuit reached precisely the same result. In *American Reliable Insurance Co. v. Stillwell*, 336 F.3d 311 (4th Cir. 2003) – a case that Petitioners themselves cite as a correct application of the *Rooker-Feldman* doctrine (Pet. 22) – a party "prepar[ed] a complaint raising claims identical to those in state court . . . and fil[ed] it immediately prior to the state court decision in preparation for an adverse determination." *Id.* at 318. The party also admitted that it intended "to let the federal complaint sit . . . while awaiting the state-court decision and to pursue it only if [it] lost in state court." *Id.* (internal quotation marks omitted). The Fourth Circuit rejected this "ploy" to "nullify the purpose of [the] *Rooker-Feldman*" doctrine. *Id.* "[A] party cannot avoid *Rooker-Feldman* . . . where it is patently obvious, as it was here, that the federal action is intended to be nothing more than an appeal of an unfavorable decision by the state court." *Id.* at 319. As the Fourth Circuit put it, barring the federal action was

"consistent with the spirit of the *Rooker-Feldman* doctrine," which "elevat[es] substance over form." *Id.*

The substance and spirit of the *Rooker-Feldman* doctrine manifestly are not served by allowing Petitioners to clog the federal court system with a suit they admit will go forward only if they are moved to attack an adverse state-court judgment. Faced with these unusual (and probably non-recurrent) facts the Third Circuit reached an entirely understandable and correct result.

B. Petitioners Did Not Raise Below, And The Third Circuit Did Not Consider, The Question Presented In The Petition

Before the Third Circuit, Petitioners raised only two issues with respect to the *Rooker-Feldman* doctrine's applicability to their federal action. Neither was the question presented in their petition.

First, Petitioners argued that the *Rooker-Feldman* doctrine did not apply because they filed their federal action before they filed "identical claims" as counterclaims in the Delaware Superior Court. (Pet. App. 6a) The Third Circuit correctly rejected this argument, stating that the "only timing relevant is whether the state judgment precedes a federal judgment" and it is "the substance of the state court's judgment compared to the plaintiff's claims in the federal action" that determines *Rooker-Feldman*'s applicability. (*Id.*) Petitioners do not take issue with the Third Circuit's rejection of their argument on this issue.

Second, Petitioners argued that ExxonMobil (the parent corporation) was not, in fact, a party to the Delaware litigation, whose counterclaims were brought by two of ExxonMobil's wholly-owned subsidiaries. The Third Circuit rejected this claim on the grounds that the "common sense privity principle" and "the fact that ExxonMobil's interest in its federal claims is identical to its subsidiaries' interest in their state court claims" meant that ExxonMobil was a party to the Delaware action. (Pet. App. 7a-8a) Petitioners have

not challenged the Third Circuit's resolution of this issue against them, either.

Below, Petitioners did not so much as hint at their present position that application of the *Rooker-Feldman* doctrine to bar their "insurance policy" federal action would improperly conflate that doctrine with res judicata. Nor, after the Third Circuit issued its decision, did Petitioners file a petition for rehearing or suggestion of rehearing en banc raising this question. Having not raised their question presented in the court below, Petitioners cannot properly raise it here. This Court does "not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *accord, e.g., Glover v. United States*, 531 U.S. 198, 205 (2001).

C. Whether Decided On *Rooker-Feldman* Grounds Or On Res Judicata Grounds, Petitioners "Insurance Policy" Federal Action Is Barred

This case is a poor vehicle for exploring the differences between the *Rooker-Feldman* doctrine and res judicata principles for yet another reason: The outcome of this case would be the same under either analysis.

Petitioners as much as concede this point in arguing that the Third Circuit's analysis tracked precisely the application of Delaware res judicata law. (*See* Pet. 7, 9, & 20 n.4) As discussed above (*see supra* pp. 6-8), this is a mischaracterization of the decision below. But Petitioners are correct that, had the Third Circuit analyzed this case under Delaware res judicata law, it would have reached the same result. Delaware's res judicata doctrine "precludes a second attempt to litigate the same 'cause of action.'" *Hughes v. Trans World Airlines, Inc.*, 336 A.2d 572, 574 (Del. 1975); *accord, e.g., Ezzes v. Ackerman*, 234 A.2d 444, 445 (Del. 1967) ("[A] judgment entered either after trial on the merits or upon an approved settlement is res judicata and bars subsequent suit on the same claim . . . ."). Moreover, even a "judgment being appealed will support the application

of . . . res judicata." *Maldonado v. Flynn*, 417 A.2d 378, 384 (Del. Ch. 1980); *accord, e.g., Playtex Family Prods., Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 684 n.2 (Del. Super. Ct. 1989); *Restatement (Second) of Judgments* § 13 cmt. f (1982). *See generally* 28 U.S.C. § 1738 (state "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken").

Thus, because Petitioners' suit is not only barred under the *Rooker-Feldman* doctrine, but is also presently precluded under elementary principles of Delaware res judicata law, it is a poor vehicle for teasing out any distinctions that may exist between the two. Indeed, it is mystifying that Petitioners would seek to challenge the Third Circuit's *Rooker-Feldman*-based dismissal, which, like all subject-matter jurisdiction dismissals, is without prejudice. *See* 2 *Moore's Federal Practice* § 12.30[2] (3d ed.). The alternative is a res judicata dismissal on the merits with prejudice, which "*bars* further claims by parties or their privies on the same cause of action." *United States v. Mendoza*, 464 U.S. 154, 158 n.3 (1984) (emphasis added). *See also supra* p. 6 n.1.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

KENNETH R. ADAMO
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

GREGORY A. CASTANIAS
(*Counsel of Record*)
LAWRENCE D. ROSENBERG
JACK W. CAMPBELL IV
WILLIAM K. SHIREY II
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent

July 2004

(3)

No. 03-1696

Supreme Court, U.S.
FILED
AUG 3 - 2004
CLERK

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
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MOBIL YANBU PETROCHEMICAL COMPANY, INC.,
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SAUDI BASIC INDUSTRIES CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ANDREW S. POLLIS
DAVID J. MICHALSKI
HAHN LOESER & PARKS LLP
3300 BP Tower
200 Public Square
Cleveland, Ohio 44114
(216) 621-0150

ELIZABETH J. SHER
PITNEY, HARDIN, KIPP
& SZUCH LLP
200 Campus Drive
Florham Park, New Jersey 07932
(973) 966-6300

* Counsel of Record

JAMES W. QUINN
DAVID LENDER
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-7000

GREGORY S. COLEMAN *
CHRISTIAN J. WARD
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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ARGUMENT

I. THIS CASE PRESENTS A PURE QUESTION OF LAW WITH BROAD IMPLICATIONS THAT THE THIRD CIRCUIT DECIDED IN CONFLICT WITH OTHER CIRCUITS.

The Court should grant the petition because this case squarely presents the important legal question whether the *Rooker-Feldman* doctrine divests federal courts of jurisdiction solely because a pending state-court proceeding presents identical issues. The Third Circuit's sua sponte application of *Rooker-Feldman* is grounded solely in the court's serious misperception that the doctrine may be applied

as a form of preclusion. That misperception brought the Third Circuit into conflict with other courts of appeals that have correctly restricted application of *Rooker-Feldman* to cases in which the federal plaintiff seeks review of a state-court decision in a federal district court. ExxonMobil prevailed in the Delaware state-court action and has sought no review of that favorable judgment in federal court. Under a proper construction of the doctrine, there was no permissible basis on which the *Rooker-Feldman* doctrine could possibly apply to this case.

Contrary to SABIC's assertion, the court of appeals's decision was not factbound. The only fact relevant to the court of appeals's holding is the undisputed fact that the Delaware and federal actions raise identical claims arising from SABIC's overcharging the joint ventures. Pet. App. 6a. That basic scenario—the existence of identical or overlapping claims in parallel federal and state litigations—is certain to recur often under the congressionally crafted jurisdictional structure that provides for concurrent jurisdiction in many cases. *See, e.g.*, *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970) ("[T]he state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.").

Under the Third Circuit's application of *Rooker-Feldman*, the identity of claims in the federal and state actions—standing alone—is sufficient to impose the jurisdictional bar. Although the court of appeals purported to focus on the fact that ExxonMobil's claims had already been "actually litigated" in the Delaware superior court, Pet. App. 8a, it could not have found that ExxonMobil sought federal appellate review of that decision because—as the court acknowledged—ExxonMobil prevailed at the Delaware trial. Only by speculating that ExxonMobil might in the future seek review of a potential adverse decision by the Delaware Supreme

Court could the court even hypothesize a possible future application of *Rooker-Feldman*. *See id.* But that hypothetical approach—grounded not in ExxonMobil's request for federal review of the Delaware judgment but instead in the mere possibility that ExxonMobil might *someday* seek such review—brings the Third Circuit's *Rooker-Feldman* jurisprudence into direct conflict with that of other circuits and this Court.

The Third Circuit is now in direct conflict with the Sixth, Seventh, and Ninth Circuits, which apply *Rooker-Feldman* only when the federal plaintiff's claim is that the state-court judgment itself caused injury. *See Stemler* v. *Florence*, 350 F.3d 578, 589 (CA6 2003); *Noel* v. *Hall*, 341 F.3d 1148, 1163 (CA9 2003); *GASH Assocs.* v. *Vill. of Rosemont*, 995 F.2d 726 (CA7 1993). In conflict with the Fourth and Ninth Circuits, the Third Circuit has now applied *Rooker-Feldman* preemptively when the relevant state court has not yet rendered a decision. *See Noel*, 341 F.3d, at 1165; *Am. Reliable Ins. Co.* v. *Stillwell*, 336 F.3d 311, 319-20 (CA4 2003) (requiring that a state court have rendered a relevant decision before *Rooker-Feldman* would apply); *Vulcan Chem. Techs., Inc.* v. *Barker*, 297 F.3d 332, 338 n. 2 (CA4 2002) ("It would be a novel application of the already beleaguered *Rooker-Feldman* doctrine to divest a federal court of subject matter jurisdiction simply because a parallel case was later filed in State court seeking to decide the same question."). In conflict with all those circuits, although in accord with at least the Second Circuit, the Third Circuit found that ExxonMobil's claims fell within the scope of *Rooker-Feldman* for no reason other than that those claims would fall within the scope of ordinary res judicata principles. *Compare Stemler*, 350 F.3d, at 589 (distinguishing *Rooker-Feldman* from preclusion); *Noel*, 341 F.3d, at 1160-61 (same); *Am. Reliable*, 336 F.3d, at 318 (distinguishing *Rooker-Feldman* and preclusion, although noting there is overlap); *GASH*, 995 F.2d, at 728 (distinguishing *Rooker-Feldman* from preclusion), *with Moccio* v. *N.Y. State Office*

of Court Admin., 95 F.3d 195, 198-99 (CA2 1996) (describing *Rooker-Feldman* as at least coextensive with preclusion and concluding "[i]f the precise claims raised in a state court proceeding are raised in the subsequent federal proceeding, *Rooker-Feldman* plainly will bar the action.").

SABIC urges the Court to disregard the change in the Third Circuit's view of *Rooker-Feldman*, pointing to a prior opinion in which that circuit expressed greater cognizance of the distinction between *Rooker-Feldman* and preclusion. SABIC BIO 6-7 (citing *Parkview Assocs. P'ship* v. *City of Lebanon*, 225 F.3d 321, 328-29 (CA3 2000)). But the Third Circuit's latest pronouncement on the doctrine—this case—departs from the distinction made in *Parkview* and embraces an expansive view of *Rooker-Feldman* that conflicts with circuits holding that the doctrine only applies when the federal plaintiff is asserting an injury caused by a state-court judgment already made. Despite the court of appeals's statements purporting to "take[] a narrow view of the *Rooker-Feldman* doctrine," Pet. App. 6a (citing *Parkview*, 225 F.3d, at 326), it could not have reached its holding in this case without conflating the scope of *Rooker-Feldman* with that of preclusion and applying *Rooker-Feldman* simply because identical claims were pending in the parallel state proceeding. The Third Circuit, the Second Circuit, and perhaps the Tenth Circuit, *see Merrill Lynch Bus. Fin. Servs., Inc.* v. *Nudell*, 363 F.3d 1072, 1075 (CA10 2004), are now in direct conflict with those circuits that do not treat *Rooker-Feldman* and res judicata as coextensive and with *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462, 487-88 & n.19 (1983) (holding that certain claims that might be barred by res judicata were not barred by *Rooker-Feldman*).

The Third Circuit's reformulation of *Rooker-Feldman* has real consequences and broad implications. *Rooker-Feldman* properly applies only when "the losing party's claim [is] that the state judgment itself violates the loser's federal rights."

Johnson v. *De Grandy*, 512 U.S. 997, 1005-06 (1994). When overlapping or identical claims exist in federal and state court, and *Rooker-Feldman* does not properly apply, the federal district court has jurisdiction over the claims and may allow the case to go forward, abstain, stay the overlapping claims, or determine whether state preclusion law bars a party against whom the affirmative defense of res judicata is raised from relitigating a substantive issue lost (or that could have been raised but was not) in a previous adjudication. *See Noel*, 341 F.3d, at 1159, 1166; *Garry* v. *Geils*, 82 F.3d 1362, 1367 n.8 (CA7 1996).[1] But the improper expansion of *Rooker-Feldman* erroneously makes the determination a jurisdictional issue and infringes on the district court's authority to apply other, nonjurisdictional solutions—like preclusion, stay, or abstention. There is simply no basis in this Court's decisions or in the majority of circuit decisions for the Third Circuit's improper expansion of *Rooker-Feldman* to infringe on the full panoply of nonjurisdictional dispositions available to a federal district court when identical claims are asserted in both state and federal court.

Attempting to defend the Third Circuit's application of *Rooker-Feldman* puts SABIC in the topsy-turvy position of tenaciously asserting the preclusive effect of the Delaware trial court's $416.8 million judgment against it. *See* SABIC BIO 13. SABIC's argument that both *Rooker-Feldman* and res judicata would bar ExxonMobil from asserting claims because it already prevailed on those claims turns both doctrines on their heads. Instead of applying the doctrines to

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[1] SABIC overstates dicta from *Arizona* v. *California*, 530 U.S. 392 (2000), to suggest that res judicata is not considered a waivable affirmative defense in virtually all cases. *Arizona* merely noted that a court's raising of res judicata sua sponte "*might* be appropriate in *special circumstances*." *Id.*, at 412 (emphasis added). By contrast, a federal court is obligated to examine its own subject matter jurisdiction in all circumstances.

bar a losing party from overturning a judgment previously made against it, SABIC would apply them to prevent ExxonMobil from maintaining a position fully *consistent* with a previous judgment in its favor in the federal forum that has subject matter jurisdiction over ExxonMobil's claims under congressional mandate. In other words, SABIC seeks the Court's imprimatur on the Third Circuit's misapplication of doctrines actually designed to prevent a party like SABIC from relitigating issues it already lost.

Moreover, SABIC's further argument that the Third Circuit's misapplication of *Rooker-Feldman* makes no difference because a dismissal for lack of subject matter jurisdiction is without prejudice conflicts with SABIC's defense of the Third Circuit's *Rooker-Feldman* formulation. SABIC asserts that the preclusive effect of the Delaware trial court's judgment under Delaware law is sufficient to support the Third Circuit's holding applying *Rooker-Feldman*, but that preclusion would necessarily require dismissal *with* prejudice. Indeed, the court of appeals was unable to offer any plausible reason for applying the *Rooker-Feldman* doctrine to this case without acknowledging its speculative concern that Exxon Mobil might attempt to attack an adverse judgment that the Delaware Supreme Court might or might not make. That rationale has no limit and would apply equally when parallel claims are pending in a state trial court that might or might not render a judgment adverse to the federal plaintiff. Because the Third Circuit applied *Rooker-Feldman* based on the hypothetical possibility that the Delaware Supreme Court could reverse the superior court judgment, it is impossible to forecast whether such a hypothetical future judgment could raise either res judicata or *Rooker-Feldman* bars against the federal proceeding. Indeed, SABIC's primary argument in the Delaware Supreme Court seeks reversal on the basis of the Delaware statute of limitations—a ground for reversal that

even SABIC has acknowledged would carry no preclusive effect outside of the Delaware court system.[2]

Because the congressionally defined jurisdictional structure gives ExxonMobil every right to maintain its claims in the federal district court, *see, e.g.*, *Atl. Coast Line R.R.*, 398 U.S., at 295; *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910), ExxonMobil was not required to capitulate to SABIC's improper forum shopping in rushing to file in Delaware state court, and ExxonMobil's consolidation of the usurpation claims with the preexisting litigation in New Jersey federal court can hardly be called "gamesmanship." SABIC BIO 10. Any inefficiencies that might result from a party's exercise of the right to concurrent state and federal litigation could, if appropriate, be "mitigated by a number of abstention doctrines that permit, and often require, a federal court to abstain in favor of state court litigation." *Noel*, 341 F.3d, at 1159. Contrary to SABIC's misleading argument, abstention is not equivalent to dismissal for lack of subject matter jurisdiction. An abstaining court stays its hand in the exercise of its subject matter jurisdiction "on principles of comity to the pending state proceedings." *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 17 (1987). In this case, the federal district court's proceedings were already stayed pending resolution of the Delaware appeal, and ExxonMobil urged the court of appeals to stay the federal appeal as well. ExxonMobil has acknowledged at all times that it cannot seek a second recovery on the same claims if the Delaware Supreme Court affirms the judgment against SABIC, but ExxonMobil maintains its right

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[2] Both the New Jersey district court and the Delaware superior court harshly criticized SABIC's blatant forum shopping after it raced to file the Delaware declaratory judgment action solely in an attempt to invoke the Delaware statute of limitations. The fact that the claims were asserted in two jurisdictions was purely a result of SABIC's improper forum shopping, a gambit that proved to be a terrible mistake for SABIC. The Third Circuit's ruling both encourages and rewards such conduct.

to continue in the congressionally appointed federal forum if the Delaware judgment is reversed on procedural grounds.

Finally SABIC's repeated reliance on an alleged "admission" by ExxonMobil with regard to its claims in federal court, *e.g.*, SABIC BIO. 1, 8, attempts to import into the Third Circuit's *Rooker-Feldman* formulation a limiting principle that simply is not there and that, in any event, would not cure the conflict between applying *Rooker-Feldman* to bar a federal action merely because there is a parallel state action and the jurisdictional statutes that permit such parallel actions. Premising dismissal of a party's federal action on that party's unremarkable "admission" that it desires redress for its injuries in some court of competent jurisdiction cannot be squared with the jurisdictional structure providing for simultaneous prosecution of claims in state and federal courts. *See Atl. Coast Line R.R.*, 398 U.S., at 295.

II. THIS CASE IS THE PROPER VEHICLE FOR RESOLVING THE CONFLICT OVER *ROOKER-FELDMAN*.

Because it is undisputed that the claims in the parallel actions are identical, and because it cannot be disputed that the court of appeals's holding was founded on that fact, this case presents in the purest form possible the question whether the *Rooker-Feldman* doctrine divests federal courts of jurisdiction solely because a pending state-court proceeding presents identical issues. Contrary to SABIC's misrepresentations of the proceedings below, that question was both presented to and decided by the court of appeals.

ExxonMobil's letter brief—submitted in response to the court of appeals's raising questions regarding the application of *Rooker-Feldman* sua sponte the day before oral argument—expressly noted that ExxonMobil was not asking the federal district court to review the judgment of the Delaware trial court and that the speculative future scenarios

under which ExxonMobil might attempt to challenge the Delaware Supreme Court's judgment did not warrant application of *Rooker-Feldman*. ExxonMobil Letter Br., dated Dec. 18, 2003, 4-5.[3] In rejecting ExxonMobil's arguments, the court of appeals necessarily decided that the identity of claims in the two actions—at least given the speculative possibility of a future state-court judgment on those claims adverse to ExxonMobil—was sufficient to invoke *Rooker-Feldman*.[4] The court of appeals squarely —and erroneously—decided the question presented by the petition.

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[3] SABIC actually conceded this same point at oral argument. Tr. of Oral Arg., Dec. 9, 2003, 13 (SABIC's counsel stating "Exxon/Mobil isn't asking [the federal district] court to review anything at this point. *If* it asks that court to do anything that reviews a judgment of the Delaware court, then that would be, in our view, what triggers the *Rooker-Feldman* problem." (emphasis added)).

[4] Moreover, despite the disproportionate attention to the issue in the court of appeals's opinion, Pet. App. 7a-8a, the argument that Exxon Mobil Corporation could not be barred by *Rooker-Feldman* because it was not a party to the Delaware litigation appeared only in a one-sentence footnote in ExxonMobil's letter brief. ExxonMobil Letter Br., dated Dec. 18, 2003, 5 n.3. SABIC blatantly distorts the record by characterizing that point as one of two main arguments ExxonMobil raised in the court of appeals while ignoring ExxonMobil's actual main argument: that *Rooker-Feldman* cannot apply when no state-court judgment is being presently challenged. *See* SABIC BIO 12-13.

CONCLUSION

For these reasons, and those discussed more fully in the petition, the Court should grant the petition for writ of certiorari, reverse the court of appeals's judgment, and order ExxonMobil's claims to be reinstated.

Respectfully submitted,

ANDREW S. POLLIS
DAVID J. MICHALSKI
HAHN LOESER & PARKS LLP
3300 BP Tower
200 Public Square
Cleveland, Ohio 44114
(216) 621-0150

ELIZABETH J. SHER
PITNEY, HARDIN, KIPP
& SZUCH LLP
200 Campus Drive
Florham Park, New Jersey 07932
(973) 966-6300

JAMES W. QUINN
DAVID LENDER
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-7000

GREGORY S. COLEMAN *
CHRISTIAN J. WARD
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

* Counsel of Record

Counsel for Petitioners

(10)

No. 03-1696

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,
Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JOINT APPENDIX

ANDREW S. POLLIS
DAVID J. MICHALSKI
HAHN LOESER & PARKS LLP
3300 BP Tower
200 Public Square
Cleveland, OH 44114
(216) 621-0150

ELIZABETH J. SHER
PITNEY, HARDIN, KIPP & SZUCH LLP
200 Campus Drive
Florham Park, NJ 07932
(973) 966-6400

Counsel for Petitioners

JAMES W. QUINN
DAVID LENDER
WEIL, GOTSHAL & MANGES, LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-7000

GREGORY S. COLEMAN *
CHRISTIAN J. WARD
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, TX 78759
(512) 349-1930

Counsel for Petitioners

GREGORY A. CASTANIAS *
LAWRENCE D. ROSENBERG
WILLIAM K. SHIREY II
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939

KENNETH R. ADAMO
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED JUNE 22, 2004
CERTIORARI GRANTED OCTOBER 12, 2004

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY [LIVE]
(NEWARK)

Case No. 2:98-cv-04897-WHW-SDW

Saudi Basic *et al.*,

v.

Exxon Corporation, et al.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/03/2002	—	Comsolidated Lead Case (jd) (Entered: 04/03/2002)
04/03/2002	114	Amended OPINION (signed by Judge William H. Walls) (NM) (jd) Modified on 04/03/2002 (Entered: 04/03/2002)
04/22/2002	119	NOTICE OF APPEAL filed at (recvd 4:50 pm. dropbox) by (counsel for dft) SAUDI BASIC INDUSTRI Re: [113-1] order, [114-1] order, [112-1] order. Fee Status: $105.00; Receipt No. 307490. Copies notice of appeal sent to Clerk, USCA and Attorney(s): JEFFREY WARREN LORELL, ELIZABETH J SHER (DS) (Entered: 04/23/2002)
04/25/2002	120	Notice of MOTION to stay pending appeal by SAUDI BASIC, Motion set for 5/28/02 on [120-1] motion w/cert of service (Brief/PO Subm) (jd) (Entered: 04/26/2002)
05/03/2002	—	USCA recvd appeal packet 4/25/02 (DS) (Entered: 05/06/2002)
05/03/2002	127	NOTICE of Docketing ROA from USCA Re: [119-1] appeal USCA NUMBER: 02-2130 (DS) (Entered: 05/06/2002)

DATE	NO.	PROCEEDINGS
06/06/2002	140	ORDER granting [120-1] motion to stay pending appeal; denying SABIC's motion for reconsideration of that portion of this Court's 4/3/02 Amended Opinion, etc.; granting ExxonMobil's motion to enforce the 3/10 Stipulation, etc.; denying SABIC's motion for a stay of the 'overcharge'-related defenses, etc. (signed by Judge William H. Walls) (NY) (jd) (Entered: 06/07/2002)
06/17/2002	—	USCA recvd record on appeal 5/20/02 (DS) (Entered: 06/19/2002)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY [LIVE]
(NEWARK)

Case No. 2:00-cv-03841-WHW

EXXON MOBIL CORPORATION, *et al.*,
Plaintiff,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/08/2000	1	COMPLAINT filed; jury demand FILING FEE $ 150.00 RECEIPT # 283658 (JB) (Entered: 08/09/2000)
08/08/2000	2	NOTICE of Allocation and Assignment filed. Magistrate Judge SUSAN DAVIS (JB) (Entered: 08/09/2000)
08/09/2000		SUMMONS(ES) issued for SAUDI BASIC INDUSTRI (20 Days) (Mailed to Counsel) (JB) (Entered: 08/09/2000)
08/21/2000	3	Notice of MOTION to dismiss complt. & for other relief by SAUDI BASIC INDUSTRI, Motion set for 9/25/00 on [3-1] motion w/cert of service. (Brief/PO Subm) (sr) (Entered: 08/22/2000)
08/21/2000	4	DECLARATION of Donald E. Reid, Esq. Re: [3-1] motion to dismiss complt. & for other relief (sr) (Entered: 08/22/2000)

DATE	NO.	PROCEEDINGS
08/21/2000	5	DECLARATION of Dr. Abdulrahman S. Al-Ubaid Re: [3-1] motion to dismiss complt. & for other relief (sr) (Entered: 08/22/2000)
08/21/2000	6	DECLARATION of Jeffrey W. Lorell, Esq. on behalf of SAUDI BASIC INDUSTRI Re: [3-1] motion to dismiss complt. & for other relief (sr) (Entered: 08/22/2000)
09/22/2000	7	AMENDED COMPLAINT by EXXON MOBIL CORPORAT, EXXON CHEMICAL ARABI, MOBIL YANBU PETROCHE, amending [1-1] complaint; w/cert of service. (sr) (Entered: 09/25/2000)
09/25/2000	9	AFFIDAVIT of Elizabeth J. Sher * * * (sr) (Entered: 09/27/2000)
09/29/2000	10	Notice of MOTION to consolidate cases 00-cv-3841 w/98-cv-4897 by EXXON MOBIL CORPORAT, EXXON CHEMICAL ARABI, MOBIL YANBU PETROCHE, Motion set for 10/23/00 on [10-1] motion w/cert of service. (Brief/PO sub) (sr) (Entered: 10/02/2000)
09/29/2000	11	AFFIDAVIT of Elizabeth J. Sher, Esq. on behalf of EXXON MOBIL CORPORAT, EXXON CHEMICAL ARABI, MOBIL YANBU PETROCHE Re: [10-1] motion to consolidate cases 00-cv-3841 w/98-cv-4897 (sr) (Entered: 10/02/2000)
10/10/2000	12	Minute entry: Proceedings recorded by Ct-Reporter: none; Minutes of: 10/10/00; The following actions were taken, at call for [3-1] motion to dismiss complt. & for other relief taken under advisement, purs to Rule 78 By Judge William H. Walls (sr) (Entered: 10/12/2000)

DATE	NO.	PROCEEDINGS
10/20/2000	16	COPY OF DECLARATION of Marc C. Singer, Esq. on behalf of SAUDI BASIC INDUSTRI Re: in opposition to [10-1] motion to consolidate cases 00-cv-3841 w/98-cv-4897 (original fld. in cv-98-4897) (sr) (Entered: 10/23/2000)
10/20/2000	17	DECLARATION of Dr. Abdulrahman S. Al-Ubaid on Re: [10-1] motion to consolidate cases 00-cv-3841 w/98-cv-4897 (sr) (Entered: 10/23/2000)
10/20/2000	18	DECLARATION of Mohammad Al-Bat'hi iin support of Saudi Basic's motion to dismiss (sr) (Entered: 10/23/2000)
10/27/2000	22	DECLARATION of Marc C. Singer, Esq. on behalf of SAUDI BASIC INDUSTRI Re: motion to dismiss (sr) (Entered: 10/30/2000)
02/08/2001	28	Notice of MOTION to stay all pre-trial proceedings pending final decision on Motion to Dismiss Amended Complt. by SAUDI BASIC INDUSTRI, Motion set for 3/12/01 on [28-1] motion w/cert of service. (Brief/PO Subm) (sr) (Entered: 02/09/2001)
02/08/2001	29	DECLARATION of Jeffrey W. Lorell, Esq. on behalf of SAUDI BASIC INDUSTRI Re: [28-1] motion to stay all pre-trial proceedings pending final decision on Motion to Dismiss Amended Complt. (sr) (Entered: 02/09/2001)
02/26/2001	30	DECLARATION of David Lender, Esq. (brief sub) (fld. under seal) (sr) (Entered: 02/27/2001)

DATE	NO.	PROCEEDINGS
03/12/2001	32	Minute entry: Proceedings recorded by Ct-Reporter: none; Minutes of: 03/12/01; The following actions were taken, [28-1] motion to stay all pre-trial proceedings pending final decision on Motion to Dismiss Amended Complt. taken under advisement; purs to Rule 78 By Judge William H. Walls (sr) (Entered: 03/14/2001)
04/03/2002	33	OPINION fld. (signed by Judge William H. Walls) (sr) (Entered: 04/03/2002)
04/03/2002	34	ORDER granting [10-1] motion to consolidate cases 00-cv-3841 w/98-cv-4897 denying [3-1] motion to dismiss complt. & for other relief (signed by Judge William H. Walls) (NM) (sr) (Entered: 04/03/2002)
04/03/2002		Case closed (sr) (Entered: 04/03/2002)
04/03/2002		Consolidated Member Case. Lead Case Number: 2cv98 4897 (sr) (Entered: 04/03/2002)
04/19/2004	35	USCA OPINION. (ce,) (Entered: 04/27/2004)
04/19/2004	36	Judgement of USCA vacating USDC order of April 3, 2002, and dismissing appeal for lack of subject matter jurisdiction. Costs taxed in favor of appellant Saudi Basic Industries Corporation in the sum amount of $903.24 (USCA# 02-2130). (ce,) (Entered: 04/27/2004)
04/29/2004	37	ORDER Amending Published Opinion filed March 24, 2004 (USCA# 02-2130). (ce,) (Entered: 05/10/2004)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2130

EXXON MOBIL CORPORATION, *et al.*,
Appellees,

v.

SAUDI BASIC INDUSTRIES *et al.*,
Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/26/02	CIVIL CASE DOCKETED. Notice filed by Saudi Basic Industries Corporation. □ (tlw) [02-2130]
6/14/02	Certified copy of order dated 6/6/02, (Walls,DJ) denying SABIC's motion for reconsideration of that portion of this Court's April 3, 2002 Amended Opinion, denying SABIC's motion to clarify and/or reform the March 10 Stipulation and finding that SABIC has breached the March 10 Stipulation. Exxon Mobil's motion to enforce the March 10 Stipulation is granted, and SABIC shall fully comply with the terms of the March Stipulation, which are incorporated herein by reference. SABIC's motion for a stay of Case No. 00 3841 pending appeal of that portion of the 4/3 Opinion denying SABIC's motion to dismiss the claims in Case No. 00-3841, being unopposed, is granted. SABIC's motion for stay of the "overcharge"-related defenses in case no.98-4897 is denied, filed. (tlw) [02-2130]

DATE	PROCEEDINGS
4/28/03	ORDER (Clerk) on April 22, 2002, SABIC filed a notice of appeal from the order of the District Court denying SABIC's motion to dismiss the complaint under the Foreign Sovereign Immunities Act. On June 21, 2002, SABIC filed a notice of appeal from the order of the District Court entered June 7, 2002. It appears that this notice of appeal was erroneously construed as an amended notice of appeal. As such it is hereby O R D E R E D that the "amended notice of appeal" shall be docketed as a separate notice of appeal at No. 03-2201. The entries of appearance and disclosure statements filed in No. 02-2130 shall be deemed filed in No. 03-2201. Appellee Exxon Mobil Corporation filed a Motion for Dismissal of Appeal for want of Appellate Jurisdiction or in the alternative for Partial Summary Affirmance. As this motion related only to SABIC's appeal of the June 7, 2002 order, the motion shall be construed as a Motion to Dismiss the appeal at No. 03-2201 or in the Alternative for Summary Affirmance and shall be docketed in appeal No. 03-2201, only. Likewise Appellee Exxon's Brief in Support of the Motion, Appendix in Support of the Motion, Unopposed Motion to Maintain Filings Under Seal, SABIC's Oppostion to the Motion, SABIC's Unopposed Motion to Maintain Filings Under Seal, SABIC's Corrected Page 4, Appellee's Reply Brief, and Appellee's Unopposed Motion to Maintain Reply Brief Under Seal, shall all be deemed filed in appeal No. 03-2201. The Clerk shall hold these

DATE	PROCEEDINGS
	documents as docketed in No. 03-2201 under seal pursuant to the unopposed motions by the parties pending final decision by the Court. With respect the submission of the appeal at No. 02-2130 for dismissal due to a jurisdictional defect, after review of the jurisdicational response and at the direction of the Court the matter will not be submitted for possible dismissal. See Federal Insurance Co. v. Richard Rubin & Co., Inc., 12 F.3d 1270 (3d Cir. 1993). A briefing and scheduling order shall be issued in No. 02-2130. Any objection to this order shall be filed within 10 days from the date of this order, filed. (nmb) [02-2130]
6/9/03	BRIEF/APPENDIX (vol 1 attached) on behalf of Appellant Saudi Basic Ind in 02-2130. Pages: 54, Copies: 10, Word Count: 12,426, Delivered by hand, filed. Certificate of service date 6/9/03. [SEALED—See Court's Order dated 3/25/04] (gpk) [02-2130]
7/8/03	BRIEF with attachment on behalf of Appellees 02-2130. Pages: 50. Copies: 10, Word Count: 12,235, Delivered by mail, filed. Certificate service date 7/8/03. [SEALED—See Court's Order dated 3/25/04] (gpk) [02-2130]
7/9/03	MOTION by Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. to stay consideration of appeal pending outcome of related proceedings, filed. Answer due 7/21/03. Certificate of Service dated 7/8/03. (ghb) [02-2130]

DATE	PROCEEDINGS
7/22/03	RESPONSE by Appellant Saudi Basic Ind in Opposition to Motion by Appellees to Stay Condiseration of Appeal, received. Certificate of service dated 7/21/03. (nmb) [02-2130]
7/25/03	REPLY BRIEF/w Attachments on behalf of Appellant Saudi Basic Ind in 02-2130. Copies: 10, Delivered by mail, filed. Certificate of service dated, 7/25/03. [SEALED—See Court's Order dated 3/25/04] (gas) [02-2130]
7/31/03	REPLY BRIEF by Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. in further Support of motion to stay consideration of appeal pending outcome of related proceedings, filed. Certificate of service dated 7/30/03. (ghb) [02-2130]
8/5/03	ORDER (Sloviter, Authoring Judge, and McKee, Circuit Judges) granting motion by Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. to stay consideration of appeal pending outcome of related proceedings in the Superior Court for the State of Delaware in and for New Castle County, filed. A-125 (ghb) [02-2130]
8/5/03	Certified copy of order to Lower Court. (ghb) [02-2130]
10/20/03	CALENDARED for Tuesday,—December 9, 2003. (clr) [02-2130]

DATE	PROCEEDINGS
10/24/03	CLERK'S LETTER to counsel written at the direction of the Court requesting that the parties advise this office in writing within 10 days of the date of this letter of the status of the related proceedings in the Superior Court for the State of Delaware in and for New Castle County. Until this matter is resolved, counsel should notify this office every 30 days in writing of the status of the this appeal, filed. Status Report Due 11/3/03. (ghb) [02-2130]
10/24/03	MOTION by Appellant Saudi Basic Industries Corporation to lift the stay imposed on August 5, 2003 by a two-judge motions panel of this Court so that oral argument in this case can proceed in tandem with argument at No. 03-2201 which is scheduled to be heard by a panel of this Court on December 9, 2003, filed. Answer due 11/3/03. Certificate of Service dated 10/24/03. (ghb) [02-2130]
10/28/03	ORDER (Clerk), It is hereby ordered that Exxon Mobil Corporation file a response to SABIC's motion to lift the stay within 5 days from the date of this order. In particular, Exxon should address whether there are common issues in *Sabic v. Exxon*, No. 02-2130 and *Sabic v. Exxon*, No. 03-2201 which would lend the cases to be decided by a single panel, filed. (ghb) [02-2130]
10/31/03	RESPONSE by Appellees Exxon Mobil Corporation, Exxom Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. in Opposition to MOTION by Appellant Saudi Basic Industries Corporation to lift stay, filed. Certificate of Service dated 10/30/03. (ghb) [02-2130]

DATE	PROCEEDINGS
11/3/03	STATUS REPORT from Andrew S. Pollis, Esq.,\counsel for Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc., advising that on September 2, 2003, the trial court issued its last in a series of rulings on SABIC's post-trial motions. On October 1, 2003, SABIC filed a notice of appeal to the Supreme Court of Delaware, docketed as Case No. 493, 2003. On October 3, 2003, the Clerk of that court set a briefing schedule under which SABIC's opening brief is due on or before November 17, 2003; Exxon Mobil's answering brief is due 30 days after service of SABIC's opening brief and SABIC's reply brief is due 15 days after service of Exxon Mobil's answering brief, received. Next Status Report Due 12/3/03. (ghb) [02-2130]
11/3/03	REPLY by Appellant Saudi Basic Ind TO RESPONSE by Appellees to Appellant's Motion to Lift Stay of Appeal, filed. Certificate of service dated 11/3/03. (nmb) [02-2130]
11/4/03	STATUS REPORT from Gregory A. Castanias, Esq., counsel for Appellant Saudi Basic Industries, Inc., advising that the proceedings in the Superior Court for the State of Delaware are now complete and a final judgment has been entered. The Delaware Action is now on appeal to the Delaware Supreme Court. Appellant SABIC filed a notice of appeal with the Delaware Supreme COurt on October 1, 2003, and SABIC's opening brief is due November 17, 2003. Thereafter, Appellee Exxon Mobil must file a response no later than December 17, 2003,

DATE	PROCEEDINGS
	with SABIC's reply brief due two weeks later on January 2, 2004. At present, the Delaware Supreme Court has not scheduled oral argument, received. Next Status Report Due 12/3/03. (ghb) [02-2130]
11/12/03	ORDER (Ambro, Authoring Judge, Fuentes and Chertoff, Circuit Judges) granting the motion by Appellant Saudi Basic Industries Corporation to lift stay of appeal. The stay imposed by the Court Order entered August 5, 2003 is hereby dissolved. It is further ordered that the appeals at Nos. 02-2130 and 03-2201 are consolidated for disposition. The cases will remain calendared for disposition on December 10, 2003, filed. (nmb) [02-2130 03-2201]
12/3/03	Letter dated 12/2/03 from Andrew S. Pollis, Esq., counsel for Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc., advising that the briefing schedule in the Supreme Court of Delaware has now been deferred while that court entertains various motions filed by Saudi Basic Industries Corporation, received for the information of the Court. (ghb) [02-2130]
12/8/03	CLERK'S LETTER to counsel written at the direction of the Court, please be prepared to address the following issues at oral argument. 1. Whether the District Court has juris liction over this case notwithstanding the Rooker-Feldman Doctrine, which precludes a federal court from hearing claims that have been already litigated in state court? 2. Whether the District Court should apply the Colorado River Abstention Doctrine to

DATE	PROCEEDINGS
	this case, and either stay or dismiss the case pending the outcome of SABIC's appeal of the Delaware Superior Court judgment in Exxon's favor? (eh) [02-2130 03-2201]
12/9/03	ARGUED Tuesday, December 9, 2003 Panel: Ambro, Fuentes and Chertoff, Circuit Judges. Counsel for Appellant: Gregory A. Castanias and Counsel for Appellees: James W. Quinn. (clr) [02-2130 03-2201]
12/9/03	COURT RESPONSE REQUEST AT ORAL ARGUMENT. Court directed counsel to file memoranda addressing various issues. Response due by Friday, December 19, 2003. (clr) [02-2130 03-2201]
12/18/03	A copy of the Transcript of the oral argument held Tuesday, December 9, 2003, received from William K. Shirey, Esq., in the a capacity of liaison counsel (for the purposes of filing the transcript), in the above-referenced matter, prepared at the direction of the Court. (clr) [02-2130 03-2201]
12/19/03	ANSWER/Letter brief dated December 18, 2003, received from Gregory A. Castanias, Esq., counsel for Appellants/Cross Appellee, addressing various issues submitted in direct response to the Court's at oral argument on Tuesday, December 9, 2003, filed. (clr) [02-2130 03-2201]
12/19/03	ANSWER/Letter brief dated December 18, 2003, received from James W. Quinn, Esq., counsel for Appellees/Cross Appellants, addressing various issues, submitted in direct response to the Court's at oral argument on Thursday, December 11, 2003. (clr) [02-2130 03-2201]

DATE	PROCEEDINGS
2/5/04	Letter dated 2/4/04 from Andrew S. Pollis, Esq., counsel for Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc., advising that the Delaware Supreme Court issued an order on January 29, 2004 denying the various motions filed by Saudi Basic Industries Corporation, effectively establishing a new briefing schedule. Under the new schedule, all of the briefing in Delaware is to completed by March 23, 2004, received for the information of the Court. (ghb) [02-2130]
3/24/04	PUBLISHED PRECEDENTIAL REPORTED OPINION (Ambro, Authoring Judge, Fuentes and Chertoff, Circuit Judges), filed. (ghb) [02-2130]
3/24/04	JUDGMENT: VACATED and DISMISSED for lack of subject matter jurisdiction. Costs taxed against Appellees, filed. (ghb) [02-2130]
4/15/04	MANDATE ISSUED, filed. (03-2201) (ghb) [02-2130]
4/27/04	ORDER AMENDING PUBLISHED OPINION (Ambro, Authoring Judge, Fuentes and Chertoff, Circuit Judges), filed. (ghb) [02-2130]
4/27/04	Certified copy of order to Lower Court. (ghb) [02-2130]
6/28/04	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellees. Filed in the Supreme Court on 6/22/04 at Supreme Ct. case number: 03-1696. (mgd) [02-2130]

DATE	PROCEEDINGS
10/18/04	U.S. Supreme Court order dated 10/12/04, at S.C. number: 03-1696 granting petition for writ of certiorari by Appellees Exxon Mobil, Exxon Chem Arabia and Mobil Yanbu, filed. (jht) [02-2130]

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
MARCIA M. WALDRON, CLERK
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
(215) 597-2995
Website: pacer.ca3.uscourts.gov

Via Facsimile and Regular Mail

December 8, 2003

Gregory A. Castanias, Esq.
Elizabeth J. Sher, Esq.
Andrew S. Pollis, Esq.

Re: Saudi Basic Industries Corp., et al. v. Exxon Corporation, et al. Nos. 02-2130/2201

Dear Counsel:

At the directed of the Court, please be prepared to address the following issues at oral argument.

1. Whether the District Court has jurisdiction over this case notwithstanding the Rooker-Feldman Doctrine, which precludes a federal court from hearing claims that have been already litigated in state court?

2. Whether the District Court should apply the Colorado River Abstention Doctrine to this case, and either stay or dismiss the case pending the outcome of SABIC's appeal of the Delaware Superior Court judgment in Exxon's favor?

Very truly yours,
MARCIA M. WALDRON, Clerk

/s/ Eric Hernandez
By: Eric Hernandez, Calendar Clerk
Direct Dial: (267) 299-4956

COPY OF TRANSCRIPT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2130/03-2201

SAUDI BASIC INDUSTRIES CORPORATION, Individually, And In The Name of, And On Behalf Of; AL-JUBAIL PETROCHEMICAL COMPANY, A Partnership

v

EXXON MOBIL CORPORATION
(D.C. No. 98-cv-04897)

EXXON MOBIL CORPORATION; EXXON CHEMICAL ARABIA, INC.; MOBIL YANBU PETROCHEMICAL COMPANY, INC.

v

SAUDI BASIC INDUSTRIES CORPORATION
(D.C. No. 00-cv-03841)

Appellant

Transcript from the audio tapes of the oral argument held Tuesday, December 9, 2003, at the United States Court House, 601 Market Street, Philadelphia, Pennsylvania. This transcript was produced by James DeCrescenzo, a Registered Diplomate Reporter, an Approved Reporter of the United States District Court, and Notary Public.

BEFORE:

The Honorable Thomas L. Ambro, The Honorable Julio M. Fuentes, The Honorable Michael Chertoff

Appearances:

Gregory A. Castanias, Esquire
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

Counsel for Appellant

James W. Quinn, Esquire
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, N.Y. 10153

Counsel for Appellees

THE COURT: Last case for today is numbers 02-2130 and 03-2201, Saudi Basic Industries, et al v Exxon Corporation and Exxon Mobil Corporation, et al.

Now we have Mr. Castanias, am I pronouncing that correctly?

MR. CASTANIAS: Exactly right, your Honor.

THE COURT: Every now and then you get them. And Mr. Quinn. I got Quinn.

Let's deal with the waiver case first. And you, I think, have both received a letter from the Court asking you to address how it is that the *Rooker-Feldman* doctrine does not or does apply, as well as the abstention doctrine. So if you would deal with that first, please.

MR. CASTANIAS: Thank you, your Honor. May it please the court, Greg Castanias for SABIC, the appellant in both cases, and I wish to reserve three minutes for rebuttal.

THE COURT: Granted.

MR. CASTANIAS: Turning to the questions raised by the Court with regard to number 02-2130, the Foreign Sovereign

Immunities Act appeal, the court has asked two questions. The first is with respect to Colorado River abstention.

The court will note that the district court was asked to abstain under the Colorado River doctrine and denied that motion on the ground that it could find no substantial federal interest in doing so.

But what is important to note at this point—

THE COURT: Normally under—if you deal with Colorado River, I've got about eight factors you take into account: Whether you have the lack of substantial proceedings in Federal Court when this federal action was filed, and the answer would be, would appear to be yes.

Second is the dominance of state law issues, and these are contract claims, which appear to be state law issues.

Third is the government's participation in other state proceedings, which is not applicable here.

Fourth is the geographic location of the Federal Court, which doesn't appear to be an apparent concern.

Fifth is the need to avoid piecemeal litigation. And that would at least seem to weigh in favor of abstention, in light of what was going on in Delaware.

Sixth was the order in which the jurisdiction was obtained by concurrent forums. And obviously the state court action was filed first.

Seventh was the presence of federal law issues. I don't know of any.

And lastly, the probable inadequacy of the state court proceeding to protect a party's right, which appears that the state court proceeding on the overcharge issue could protect parties' rights, or else you wouldn't have participated in Delaware. So I'm lost as to why the court wouldn't have abstained here.

MR. CASTANIAS: Well, I think—first of all, we did make a motion for abstention, and so we sought abstention at the time. But it's important to understand that that motion was made in August of 2000.

The court did not decide this issue until April of 2002. When the district judge in this case had the briefing in front of him on Colorado River abstention, the Delaware case was at an incipient stage, there had been no counterclaims filed as of yet. In fact, the counterclaims that ultimately led to the large judgment in favor of Exxon/Mobil in Delaware did not get filed until January of 2002. And those, to the best of my reading of the record, were not in front of the judge when he made his Colorado River ruling.

What's happened since that ruling, and there's been a delay in this case because of an administrative snafu in the clerk's office, what's happened since April of 2002 is that the Delaware case has in fact proceeded to judgment, and it's now on appeal.

So there was no *Rooker-Feldman* issue that was briefed or addressed at the time that the Colorado River abstention motion was made. But now Colorado River abstention would be significant for the district—I'm sorry.

THE COURT: Was the Delaware action actually filed on what, July 4th of 2000?

MR. CASTANIAS: It's somewhere around that time is my recollection.

THE COURT: I mean you can file 365 days a year in superior court. It sounds like there was a budding dispute and the other side wished to—or actually you filed in Delaware; is that correct?

MR. CASTANIAS: Right. We filed a declaratory judgment action. And the counterclaims, which were then inverted to make Exxon/Mobil the plaintiff, the real plaintiff in

interest in the Delaware action, were not filed until January of 2002, just a couple months before the ruling.

THE COURT: Yes, but the state judge inverted it because the state judge found that in effect mediation in New Jersey was not going well, that you all ran down to Delaware quick to beat Exxon to the punch. So we have a state court finding on that. Correct?

MR. CASTANIAS: There is a state court—I don't know if you would characterize it as a finding or a comment. Even if it's a finding, I'm not sure where that takes us with respect to the questions raised by the court though. Because what's happened subsequent to that finding or that comment by the Delaware court is that the Delaware case has proceeded to judgment.

And what Exxon/Mobil now seeks by this second case, the case we've referred to as New Jersey 2, is a contingent second bite of the apple. We don't understand why this case is still around at this point now.

This case has gone forward to judgment in Delaware. It is now on appeal to the Delaware Supreme Court. We hope to win there.

If we win, I don't understand what Exxon/Mobil will be able to do in Federal District Court in New Jersey after that. One would think that res judicata would attach. One would think that any effort to overcome such a ruling by the Delaware Supreme Court on appeal would inevitably ask Judge Walls to reconsider state court rulings, which is clearly the *Rooker-Feldman* doctrine.

THE COURT: Well that assumes that the appellate ruling is definitive. I mean you could have, the Supreme Court could say there was trial error, we're sending it back for new trial. And then at that point they could say, well Exxon could say well, we would rather do this in New Jersey.

So I understand that if we were looking at a Supreme Court judgment, we might have a *Rooker-Feldman* or another issue, but at this point we don't really know how that's coming out.

MR. CASTANIAS: Well that's exactly right. And let me get to the bottom line of how we would answer the court's two questions with respect Colorado River abstention and *Rooker-Feldman.* Because there is, and as the record currently stands right now there would have to be a *Rooker-Feldman* problem, because we have a state court judgment which has led Exxon/Mobil to tell this court that it's willing to dismiss this case if they get what they want in Delaware.

But what we would suggest, if we lose on the Foreign Sovereign Immunities Act issues, and that's the only way these issues come up. We continue to maintain that we're immune and that the district court erred on its two alternative holdings, and I'll get to that in a moment.

But in the event of any remand or further proceedings on the New Jersey 2 matter, I would suggest that the court remand the matter with specific instructions to the district court to reconsider the Colorado River abstention question in light of the changed circumstances arising from the completion of the Delaware trial court proceedings and the Delaware judgment.

And the Colorado River abstention is not a dismissal, it's simply a stay, so that would hold things in abeyance until it could determine, Judge Chertoff, whether the concerns you're raising about what might happen in the Delaware Supreme Court in fact come to pass.

And—

THE COURT: Do have you a sense of when the Delaware Supreme Court might resolve the case? Is there—

MR. CASTANIAS: I can give you some background of it, Judge Fuentes. Our brief, our opening brief on the Delaware

Supreme Court appeal was originally due right around this time, maybe actually a couple weeks ago it would have been due.

There's a pending remand motion in the Delaware Supreme Court having to do with a statement of foreign law that's been submitted by the Saudi Arabian government in that case. That motion is pending before the Delaware Supreme Court. That could end up, in theory, if the remand is granted and the trial judge in Delaware considers the arguments that we'll make, that could end up turning the judgment around at the trial court level.

If not, we could end up with briefing in the Delaware Supreme Court over the next four to six months, I would guess, and an argument shortly thereafter.

If I can turn from the court's letter to the two—

THE COURT: Just one thing on *Rooker-Feldman*. You're saying on *Rooker-Feldman* there is or is not jurisdiction? From your position normally you would want to argue that there is not jurisdiction in light of *Rooker-Feldman*. But if so, how do you get there?

MR. CASTANIAS: Well, I think our position is that it's not clear yet whether there's jurisdiction or not. At this point Exxon/Mobil doesn't want to go forward in New Jersey. That matter is stayed. They've got a judgment, significant-sized judgment out of the Delaware trial court. And at this point *Rooker-Feldman* in their case would not present directly a *Rooker-Feldman* problem in its current posture because Exxon/Mobil isn't asking the district court in this case to do anything; the matter is stayed.

The *Rooker-Feldman* problem arises if—my dialogue with Judge Chertoff earlier—if in that circumstance we get a definitive ruling from the Delaware Supreme Court—

THE COURT: Does it have to be the Supreme Court?

MR. CASTANIAS: Or the trial court, for that matter. The trial court judgment. But what would have to happen the *Rooker-Feldman* problem—

THE COURT: I mean normally you think of *Rooker-Feldman* is you can't take a Supreme Court judgment and take it to, appeal it to an intermediate Federal Court under Section 157 of Title 28, you have to go directly to the U.S. Supreme Court and ask for cert.

MR. CASTANIAS: That's right.

THE COURT: But here we have a case, Desi's Pizza, which talks about were claims, quote, actually litigated, close quote, in the state court. And the question is when do claims become, quote, actually litigated.

MR. CASTANIAS: Well, I think—I confess to your Honor I'm not familiar with Desi's Pizza off the top of my head. But the language you're using comes very close to the language of res judicata. And at this point the current status of New Jersey 2 is that it's in abeyance.

Exxon/Mobil isn't asking that court to review anything at this point. If it asks that court to do anything that reviews a judgment of the Delaware court, then that would be, in our view, what triggers the *Rooker-Feldman* problem.

At this point, as we've suggested, we think the better course is if the New Jersey 2 case is still alive at the end of this appeal, if we lose on our Foreign Sovereign Immunities Act grounds, then the proper course is to remand and let the district court consider these matters in the first instance.

THE COURT: But don't you have to resolve this before you get to the FSIA argument?

MR. CASTANIAS: I'm not sure why one jurisdictional ground would have to be resolved before another.

THE COURT: Either you have jurisdiction or you don't. And then your second point is if you had your wish list we would remand to the district court, at the very least to conduct a Colorado River abstention analysis in light of the current facts.

MR. CASTANIAS: Well I think our wish list is that if you rule in our favor on the Foreign Sovereign Immunities Act grounds, if you find that the district court erred in his construction—

THE COURT: If we find that there was jurisdiction.

MR. CASTANIAS: Well the Foreign Sovereign Immunities Act is a jurisdictional provision as well. So if there's no jurisdiction under the Foreign Sovereign Immunities Act, I'm not sure which, whether *Rooker-Feldman* or the Foreign Sovereign Immunities Act jurisdiction should take precedence.

THE COURT: Well I guess we're talking about subject matter jurisdiction versus personal jurisdiction, are we not?

MR. CASTANIAS: Well, that is probably accurate.

THE COURT: No, isn't the FSIA also subject matter jurisdiction?

MR. CASTANIAS: It is indeed. Although it has aspects of personal jurisdiction to it as well because of the things like the direct effect test.

THE COURT: But would you agree with me though that at least as between Colorado River abstention and foreign sovereign immunity, Colorado River abstention is not jurisdictional. That's a prudential thing.

MR. CASTANIAS: That's correct.

THE COURT: And therefore the antecedent question would be a foreign sovereign immunities question.

MR. CASTANIAS: That's right. And if I could, Judge Chertoff, let me turn very briefly to the two points, and I see I've already used up all but a minute and—

THE COURT: That's okay. Eric, why don't you add five more minutes, please.

MR. CASTANIAS: Let me quickly turn to the two Foreign Sovereign Immunities Act questions on this case. The district court made two alternative holdings, one was that the Exxon/Mobil suit came within the commercial acts exception, and the other was that it was, that SABIC had waived its immunity by filing the New Jersey 1 and the Delaware suits. Neither of these holdings was correct.

With respect to the commercial acts exception, the district court ruled that there was a direct effect to the United States because Exxon and Mobil are United States companies—there's no other basis for the district court's ruling—that's an error as a matter of law.

That is not what Section 1605(a)(2) of the Foreign Sovereign Immunities Act and Title 28 says. It requires a direct effect in the United States, not a direct effect upon a United States corporation.

The cases we've established—yes.

THE COURT: Isn't the primary argument against you is you came to a state court and you filed in July of 2000 an action on the overcharge issue?

MR. CASTANIAS: That's correct.

THE COURT: Isn't that in and of itself a waiver of foreign sovereign immunity?

MR. CASTANIAS: And our answer to that is no. And the reason that the answer to that is no is because of the counterclaim provision. Section 1607 provides that when a

foreign sovereign files a lawsuit, the countersuing ability of the defendant is limited to counterclaims.

It is a specific textual provision that ought to govern over any general waiver provision, which is the point we've made in our briefs.

THE COURT: Doesn't the Second Circuit case from 20 years ago cut against you?

MR. CASTANIAS: Which case are you referring to?

THE COURT: The Ministry of Supply, Cairo, with Judge Friendly.

MR. CASTANIAS: I'm struggling here in recalling specific facts of Ministry of Supply.

THE COURT: Basically it's Egyptian cross-claims from, relating to a time charter in Egypt.

And Judge Friendly faces a specific issue, which is your argument that 1607 somehow by implication means the only way you can imply immunity from having litigated is by having a counterclaim. If you do it by way of cross-claim or some other mechanism it doesn't fall within 1607 and therefore that precludes 1605. And he basically rejects that argument.

MR. CASTANIAS: If that's the reading that this court gives to that decision, then we think that that is not textually proper. For all of the reasons we've set forth in our brief, the specific provision of the counterclaim provision governs over the general. I think in that case that also may be distinguishable because what you have there is a cross-claim within the same suit.

But what is crucial here is that the text of the Foreign Sovereign Immunities Act, which is to be narrowly construed, this court and other courts make that point clear, that text says that there are two specific provisions. One is when there is a

compulsory-type counterclaim, then you can bring a pure counterclaim in the same suit, and if it's not sufficiently related to be a compulsory-type counterclaim under the (b) provision, then you can bring an action for set-off under the (c) provision.

And if the contrary rule, the rule urged by Exxon/Mobil were correct, then the filing of a lawsuit by a foreign sovereign really does open up any court anywhere in the United States.

There's no limit to the theory that they've proposed and that the district court has adopted here.

THE COURT: Doesn't your action have to be—let me get a fact here. Your July 2000 action in Delaware, did it relate to the overcharge issue?

MR. CASTANIAS: Did it relate to the overcharge issue? It was a declaratory judgment that there was no breach because of the overcharge. Yes.

THE COURT: And so it would be almost automatic that the other side would file a counterclaim, would it not?

MR. CASTANIAS: Well it wasn't automatic because that counterclaim did not come until January 2002.

THE COURT: But ultimately it came.

MR. CASTANIAS: It did come.

THE COURT: And the New Jersey action that Exxon/Mobil filed was in effect a reiteration of, or a restatement of what ultimately became a counterclaim in Delaware, is that what you're saying?

MR. CASTANIAS: That's correct. Delaware gave them the opportunity, because the FSIA applies to that action as well. And we don't dispute the fact that they were perfectly entitled to file for counterclaims in that action. And they did file them. And they got the judgment and it's going up.

But what we do dispute is that gave them a right to file a free-wheeling lawsuit in New Jersey or Florida or Texas or Louisiana or anywhere else.

THE COURT: If this case is not—if you did not waive jurisdiction in this case by bringing a separate New Jersey action, or the Delaware action, when do you have waiver?

MR. CASTANIAS: Well waiver, Judge Fuentes, has been limited by the cases, and the cases turn to the legislative history of the Foreign Sovereign Immunities Act, to three circumstances—

THE COURT: No, don't do that. Because the legislative history doesn't say it's limited. It gives three illustrations.

MR. CASTANIAS: You're right. I misspoke, Judge Chertoff, it does give three illustrations. But the cases have fairly well limited waiver to those circumstances.

Now there are three cases that Exxon/Mobil relies on where they say that the initiation of other litigation brings you to waiver. And one of those cases is the 1979 case out of the district court in Illinois, in *Amoco Cadiz.* I see the red light is on but I'm hoping I can continue and hopefully—

THE COURT: Finish your answer to that. Yes.

MR. CASTANIAS:—get a little—

With respect to the *Amoco Cadiz* case, there was no reference to the text, no reference to the rule of narrow construction. And ultimately the district court there freely admitted that he was looking expansively at a big group of litigation.

The only other cases that Exxon/Mobil cites for the proposition that the filing of one lawsuit can be a waiver for another are two cases out of the Ninth Circuit. One of them the recent case of *Blaxland* and the other the *Siderman*

case. And *Blaxland is* really only cited for its discussion of *Siderman.*

But both the facts of *Siderman* and how it's been treated by other courts of appeals are very instructive about the scope of the waiver argument that Exxon/Mobil is making here.

In *Siderman* there was held to be a waiver by the fact that Argentina had filed a letter rogatory to seek to, as part of the extradition proceeding for Mr. Siderman. And Mr. Siderman was then extradited, taken to Argentina.

The act of the letter rogatory in that case was part and parcel, to use the Ninth Circuit's language, part and parcel of the claim itself of torture that was being litigated, and a waiver was found there.

Now I think what's important to note about *Siderman,* not only is that it's limited to the case where it's part and parcel, but also that it's of some questionable heritage.

The *Cabiri* case out of the Second Circuit suggests in fairly strong language that the *Siderman* case was a new and dubious theory. That's a quote from the Second Circuit there, the new and dubious theory that relies on, quote, largely inapt citation.

THE COURT: You're explaining, basically, why waiver is improper in several cases.

When do you have waiver?

MR. CASTANIAS: You have waiver, my answer to Judge Chertoff earlier was that the legislative history gave three illustrative examples.

Waiver can happen when there's an agreement to arbitrate in another country. In other words there's a contract between us and we agree that we will arbitrate this matter in a particular country. And if we agree to arbitrate in the United States, for example, that could be a waiver.

And it's important to note here, Judge Fuentes, that the agreements that are said to be breached here, those agreements provide for absolutely everything to take place in Saudi Arabia.

THE COURT: But isn't the real one when the foreign state is filed under statute, a responsive pleading in an action without raising the defense of sovereign immunity? Now I don't necessarily say that filing a complaint in Delaware is a responsive pleading, but it's the exact equivalent that you're taking advantage of a Delaware court to try to get a declaratory judgment with regard to your particular dispute.

MR. CASTANIAS: That's exactly right, Judge Ambro, and that's why Exxon/Mobil was allowed to file counterclaims in that matter.

The rule for an ordinary litigation established by the Supreme Court in the early part of the 20th Century is that the plaintiff is the master of his complaint, and that means that the plaintiff can pick where to bring this lawsuit.

In this case SABIC brought this lawsuit in Delaware not for forum shopping, although I'm not here to try to contest that finding or that comment by the trial court in Delaware, but it brought it because that was a place where there could be no question about jurisdiction over all of the defendants in the matter.

That it made sense in that regard. Now I realize the red light is on—

THE COURT: What we're going to do is hear from your opponent, and then we'll go, at 2201, we'll give you a fresh set of time, both sides for that.

MR. CASTANIAS: Thank you, your Honor.

MR. QUINN: May it please the court, James Quinn for Exxon/Mobil and the other Exxon defendants-appellees.

THE COURT: Again, if you would start off addressing the jurisdictional issues. Maybe start off with *Rooker-Feldman* and then if you want to go to the FSIA, then we can end up with Colorado River abstention.

MR. QUINN: Sure. I will concede to you this is the first time I've ever dealt with the *Rooker-Feldman* doctrine.

THE COURT: It sounds simple, but it ain't.

MR. QUINN: That I can see. I think in this particular instance we and SABIC probably are in agreement, that at least as of now the *Rooker-Feldman* doctrine would not apply. And I think the reason for that is really two-fold. We agree on one of the issues, and probably on the other, I'm not sure.

But the reason why *Rooker-Feldman* would not apply is that in the circumstances we are in right now, the district court is really not being asked to do anything with regard to the Delaware judgment. In fact, as your Honor knows, we have said—

THE COURT: But have the claims been, quote, actually litigated, close quote, in Delaware? I mean the thing that you've got going for you on *Rooker-Feldman* is that this circuit probably construes *Rooker-Feldman* more narrowly than any other circuit in the country, but it doesn't appear to be helpful to having the same claims being litigated in two courts. There's a lot of policy against that.

MR. QUINN: The reason why I think it's probably premature to adopt the doctrine at this stage is a lot of what happens depends on what the Delaware Supreme Court does. But—

THE COURT: But the question is, the issue with respect to the doctrine relates to federal jurisdiction. I mean we have to address it at the outset.

MR. QUINN: But as I understand the doctrine, the doctrine comes into play when a district court, a Federal District Court is being asked to in effect challenge or undercut in some way something that a state court, a state court judgment that's been entered. That's not what is happening here.

THE COURT: Are there issues that are so substantially intertwined in the state court judgment in Delaware with the federal action in New Jersey?

MR. QUINN: With regard to—

THE COURT: Are the overcharge issues essentially the same?

MR. QUINN: They are, your Honor. But our point has always been, and the reason why, what we call New Jersey 2, the overcharge case, continues to be extant is, first of all there's different parties, which also in the case that I think came down this summer in the Third Circuit, the case involving Amtrak, I can get you the cite.

THE COURT: I was on the panel.

MR. QUINN: Okay. One of the reasons you didn't apply *Rooker-Feldman* was because the parties weren't the same. That happens to be the case here. Exxon/Mobil is a plaintiff in the New Jersey overcharge case, the parent. It is not involved at all and has never been involved in the case in Delaware.

THE COURT: So are you telling us that basically even if the Delaware Supreme Court affirms your win below, there would be a subsequent litigation in New Jersey?

MR. QUINN: No, I'm not telling you that, your Honor, because in fact if there was a complete affirmance, we can only collect the $417 million once.

THE COURT: So if that were to happen then basically there really would be nothing left to do except dismiss the New Jersey case?

MR. QUINN: That's correct. And that's why when we initially argued this summer that this appeal be stayed, we still believe, frankly, I hate to reargue that, but we still believe that that probably is the proper thing to do at this stage, because in fact if the Delaware Supreme Court affirms the jury verdict, nothing, there's nothing further that needs to be done. The overcharge issue may get litigated in the context of New Jersey 1 as an affirmative defense and unclean hands.

THE COURT: So I'm sort of lost. Why do you care what happens in New Jersey?

MR. QUINN: Good question. The reason is because if, and we think it's unlikely, but if the Delaware Supreme Court were to reverse on some ground other than on pure substance, that would be res judicata, the fact is and one of the issues that's in the Delaware Supreme Court is the statute of limitations issue.

Well the statute of limitations in Delaware and in New Jersey are different. And it's more favorable to Exxon/Mobil, the statute of limitations, to be in New Jersey, which is one of the reasons why we wanted to be in New Jersey and they ran down to Delaware. And so—

THE COURT: But I guess you're not too unhappy so far in Delaware.

MR. QUINN: So far so good. So far so good, but knock on wood, you never know, because anything could happen. We feel pretty good about it but—

THE COURT: So New Jersey's an insurance policy.

MR. QUINN: In a way it is. But it's only an insurance policy, your Honor, because they were the ones who ran down to Delaware. We were perfectly happy to litigate

all the issues in New Jersey. They chose to go down to Delaware, and that of course leads into the whole issue of waiver. But I can also address briefly the abstention issue, if you like.

THE COURT: Maybe—

MR. QUINN: Oh you want me to go—

THE COURT: Why don't you go to FSIA then hit abstention at the end.

MR. QUINN: The two issues, and I think they're pretty clear, are the waiver issue and whether or not there was a direct effect under 16—under the commercial enterprise issue.

On the waiver issue, our position, we believe the district court was correct finding waiver.

If bringing two lawsuits, one in New Jersey and one in Delaware, isn't waiver, I don't know what could possibly be waiver.

THE COURT: What about the personal jurisdiction argument that SABIC raises, which is that it may be waiver insofar as there's a component of foreign sovereign immunity that applies to the immunity, but not as it relates to the personal jurisdiction issue.

MR. QUINN: And that may very well be valid. But in fact in New Jersey, for example, we did have personal jurisdiction, it was found to have personal jurisdiction. They have a, SABIC has an operation in New Jersey.

In fact, what we're saying is—let me give you an extreme example. Okay, let's suppose they sue in state court in California, and I'm making the example that I figure that really you're going to. Where could we sue? What's the waiver mean?

Well, it seems to us, and I believe this is a fair reading of the statute, if you can find—that's a waiver of the subject matter jurisdiction. So okay, now you can sue them. Question is where. Well, if they had a facility in Texas, or as they did here in New Jersey, or in North Carolina, you could go in and sue them in those other states. And that's I think a fair reading of the statute. And there's nothing in the statute that would prevent that.

I mean two points on the statute I think that are important and I don't want to go on to legislative history, but the fact is that the statute itself and the cases that have been decided under it make it clear that it's up to SABIC, the foreign sovereign, first of all, to show that in fact it's immune, the burden is on them.

And the burden also, once we've come forward to argue waiver and/or commercial exception, the burden is on them to show that the exceptions don't apply. And the reason for that is, and I think the Texas Trading Case in the Second Circuit is critical here, they said look, this is a matter of fairness to some degree.

This is not a situation, your Honors, where, what the Foreign Sovereign Immunity Act was really all about, preventing somebody from dragging a foreign sovereign into the United States courts.

They came here willingly twice on these very same issues. And what the Texas Trading Case says, and the reason for the exceptions is, we've got to have—it's a question of fairness. You've got to make sure that if somebody has, in this case Exxon/Mobil, has in fact been negatively affected by a foreign sovereign there has to be a place they can sue them.

So it only seems a question of fairness that the, based on what they did that in fact they have waived with regard—

THE COURT: Let me talk about commercial acts for a second. I want to make sure I understand. The essence of your claim is that SABIC overcharges the intermediary joint ventures, correct?

MR. QUINN: That is correct.

THE COURT: And the economic effect on—now the plaintiffs in New Jersey are the ultimate owners or the intermediate joint ventures?

MR. QUINN: They are the ultimate owners. They were also the plaintiffs in Delaware.

THE COURT: All right. So the economic, the way the economics of this works is, because of the overcharge to the intermediary, your claim is that the intermediary will therefore distribute lower dividends to the ultimate owners.

MR. QUINN: In essence. I mean if you look at the case that I think is governing here, the Supreme Court case in *Weltover* basically what the case says is, and it expanded this issue, and it basically says if there is a direct impact, direct effect, what does that mean?

What it means, to use the language of the Supreme Court is that, assuming it's not purely trivial, and I assume we can agree the 417 million isn't purely trivial, that it means there is an immediate consequence as a result of the defendant's activity.

Well, the jury has found in Delaware, with regard to these plaintiffs, on a dollar-for-dollar basis, there was an immediate consequence.

THE COURT: Well, I don't think you can—

THE COURT: Wait a minute. What is the immediate consequence? You're saying the 417 million, is that the dividend payment?

MR. QUINN: The $417 million was the amount of the overcharge and additional losses that were incurred.

THE COURT: I thought it was argued that there was a reduced dividend payment to ECAI, is that correct, and Mobil Yanbu.

MR. QUINN: Well, what it means is that the two joint ventures, as a result of the overcharge, obviously became that much less profitable in its ability to pay out money to—

THE COURT: But other than the possible reduced dividend payment, what conceivable direct loss was there in the U.S. that resulted from the overcharge?

MR. QUINN: I think the key thing you have to remember, your Honor, is that in this circumstance, the contracts that existed that actually created this obligation with regard to the overcharge, were not between SABIC and the joint venture.

The contracts ran directly from SABIC to the two Exxon/Mobil companies that were injured. And that's why we had a breach of contract claim in Delaware because it was—

THE COURT: But I think your problem here is this. It seems to me you're arguing that the overcharge caused a loss of profit in the joint venture, and then the next step is that leaves less money in the joint venture to be distributed as a dividend. But that's an intervening decision.

A lot of times, for whatever reasons, a dividend isn't distributed. Supposing the joint venture went into bankruptcy or were independently sued by some third party somewhere and that suit resulted in freezing all of the assets of the joint venture and there wasn't going to be a dividend distribution.

So it seems to me because you have a second step, which is you've got to show the dividends were—not just that there was a diminution of the joint venture's profits, but that there was an impact in the dividends. You've got the essence of an

indirect effect because there's a second step that has to happen.

MR. QUINN: With due respect, your Honor, I disagree. The direct effect is they make a promise to us. We are in the United States. It's a written contract. They breached that promise. The only place that we can suffer that breach is in the United States. That's separate and apart from the financial loss. And indeed there are two circuits, the Fifth and the Sixth Circuit—

THE COURT: What damage is there apart from the financial loss and breach of fact? It's always a loss of money.

MR. QUINN: But I'm focusing on what the direct effect was. The direct was the breach.

THE COURT: But the effect is what?

MR. QUINN: And it caused damage.

THE COURT: Well no, the breach is the wrongdoing, the alleged wrongdoing, the effect is the loss. If the loss is not in the United States there's no direct effect in the United States.

MR. QUINN: But we have a jury verdict that shows that the loss was in fact in the United States because that's—the jury found that the two U.S. subsidiaries suffered this dollar-for-dollar loss in the United States.

THE COURT: Do we have to wait to see if that gets affirmed? I mean if you're basing it on the jury verdict, you're saying we ought to wait on the foreign sovereign immunity point to see if the jury decides there is a direct effect. This is a legal question, it's not a jury question.

MR. QUINN: I actually think you should wait for other reasons.

THE COURT: I understand that.

MR. QUINN: But I take your point, your Honor.

THE COURT: Let's turn to the abstention issues. You heard me tick off eight abstention factors under Colorado River. And it appears that six of them cut against you and the other two don't really cut against your opponent.

MR. QUINN: Well the court, it's true that some factors have changed now because several years have gone by now. The court did look at this issue once and determined that—

THE COURT: Your opponent has said that perhaps what should be done is that if we have jurisdiction, to remand to the district court to declare under these circumstances whether abstention should be availed of in this case.

MR. QUINN: I think one point I would make, and this actually goes to the letter that you had written us, the lower court has already stayed the case because of the other issues in Delaware.

THE COURT: All the more reason should we not remand to the district court to—if there's a stay in place, it's for what reason?

MR. QUINN: The stay is currently in place because the district court has indicated, depending on the outcome of the jury verdict, that it may dismiss the first New Jersey case on unclean hands basis.

THE COURT: You mean the patent case?

MR. QUINN: Yes, the patent, it's a contract patent case, yes.

THE COURT: I'm not talking about the patent case, because we'll talk about that in a moment, but what about the overcharge case that was subsequently filed by you in New Jersey after SABIC filed in Delaware?

MR. QUINN: That is also, the whole, the cases have been consolidated, your Honor.

THE COURT: Okay.

MR. QUINN: So the whole ball of wax has been stayed, pending the outcome of the Delaware appeal.

THE COURT: So in effect, there's an argument as to why are we here?

MR. QUINN: Yes, your Honor, I think there is a strong argument as to why we're here. At this stage. We've said that before.

THE COURT: Do you care to tell me?

MR. QUINN: Well, we're here because they brought us here. As far as we're concerned, we're perfectly happy sitting and waiting to see what happens in the Delaware Supreme Court. That's been our position all along. We don't think that the FSIA needs to be decided now.

THE COURT: Let me ask you a dumb question. Is there a possibility that you could stipulate that the—I guess there's a stay—I really am—I don't understand why we're even pursuing these issues now.

MR. QUINN: It is a fair question, your Honor. The reason why is that the stay was put into effect after this appeal began on the FSIA issue.

THE COURT: And I guess in some way you did file, I guess before us, a motion to stay the appeal.

MR. QUINN: Yes. And you had stayed it for a while.

THE COURT: What circumstance would occur in Delaware that would cause the New Jersey action to go forward?

MR. QUINN: Well, I think, again, if the, if there was a reversal based on statute of limitations grounds, I think that would probably be the principal one, your Honor. Because as I said the statute of limitations is more favorable to us in New Jersey and we would then want to pursue the case there.

THE COURT: Now you say the stay is in effect right now with regard to both the overcharge and the patent actions; is that correct?

MR. QUINN: That's correct, your Honor.

THE COURT: The motion that was filed in this court that at one point was granted to stay the appeal, was that with regard to both the patent action and the overcharge action?

MR. QUINN: It was actually directed only at the overcharge action, the FSIA appeal.

THE COURT: Would you have any objection if it also were to apply to the patent action?

MR. QUINN: No.

THE COURT: Anything else?

Did you want to have any rebuttal on this particular case before we begin 2201?

MR. CASTANIAS: Just briefly, your Honor.

THE COURT: Let me ask you, just as you come up, would you have any objection to the motion for stay pending appeal, or motion I guess for stay of the appeal, excuse me, also applying to the patent action?

MR. CASTANIAS: I got a little confused at the end of the argument that we just heard, because my understanding of where things stand right now is that the stay of the appeal that Exxon/Mobil sought on the Foreign Sovereign Immunities Act appeal was lifted and that's why we're arguing this here.

THE COURT: No, you're right. You're right. I'm just saying it may be worthwhile going back and revisiting that.

MR. CASTANIAS: Well, I would urge you not to do that. I would urge you to throw the suit out on the Foreign Sovereign Immunities Act grounds that we've urged.

With respect to the other appeal, which I'll get to in a moment, let me—

THE COURT: But if we don't, let's say—

MR. CASTANIAS: If you don't do that then I think we have a problem, because what's happened subsequent—

THE COURT: Okay. But if we do not rule in your favor on the FSIA, then what is your position?

MR. CASTANIAS: Our position is that the court should remand the matter to the trial court for reconsideration of the Colorado River abstention factors in light of the *Rooker-Feldman* issues that have been raised by the Court. And—

THE COURT: Instead of holding the appeal—instead of staying the appeal pending what happens in Delaware.

MR. CASTANIAS: Well, I guess we get to the same place if you stay the appeal. Understand, however, that—

THE COURT: Well the only problem is that the patent case isn't being litigated in Delaware, that's the reason I'm—

MR. CASTANIAS: That's right. Oh, if the question, Judge Ambro, was directed to what you should do with the number 03-2201, that's what I was trying to get to, what's happened since this appeal in that case, is that SABIC has been put to a contempt hearing, and that matter has been stayed pending the outcome of that appeal by the district court.

Now I believe there is also, it may be also to say it in light of getting the decision out of Delaware, but Delaware really only affects the New Jersey 2 case, instead of what you've called the patent case, and it would be worth talking about in a moment.

Let me, by the way, before I lose my last minute here, try to address three points with respect to the Foreign Sovereign Immunities Act appeal—

There is a lurking *Rooker-Feldman* problem, as the Court has noted. There is an admission now by Exxon/Mobil that they're just using the suit as an insurance policy. That's exactly the sort of thing the federal courts ought not be used for.

This case may—perhaps it should be kicked on *Rooker-Feldman* jurisdictional grounds. But I think the better course is what we proposed earlier, which is a specific remand with specific directions to consider.

Turning to the commercial activities exception, Exxon/Mobil cited the case of Texas Trading. And both they and the district court read Texas Trading as standing for the proposition of as long as you've got an American plaintiff who can claim injury, that's enough to suffice for a direct effect in the United States. That's not correct.

It's not even correct as a matter of Second Circuit law. The Texas Trading court specifically reserved that issue. If I can hopefully address this quickly and address one other point.

THE COURT: You can finish that.

MR. CASTANIAS: The Texas Trading court specifically reserved that issue, Judge Chertoff, and subsequent Second Circuit decisions in Martin against South Africa and in the Virtual Countries case, both of which are cited in our briefs, made clear that it is not read for that expansive a proposition. Otherwise it would read out the direct effect in the United States portion of the FSIA and would simply make it a direct effect on an American plaintiff. That's not what the text says.

The polyethylene plant that was the subject of the joint venture agreements was in Saudi Arabia, all the payments were made in Saudi Arabia. There was no direct effect. At most there was an attenuated effect.

And the fact that the damages were awarded in Delaware proves nothing. All that proves is that there was causation under the common law causation doctrines. But the jury did not find in that case, and was not asked to find, that there was a direct effect in the United States.

Turning finally to the question of waiver, and again Judge Chertoff, your question that I was not prepared for with regard to Ministry of Supply, my recollection of the case was accurate, that was a case involving a cross-claim where the counterclaim provisions simply couldn't be invoked. It was also a case where the waiver in the case happened within the same—

THE COURT: But in that case Judge Friendly addresses your argument. He says look, basically I don't read 1607 as having been intended to narrow what might otherwise be under 1605. I mean that seems to me to be pretty—I mean we don't have to agree; we're not in the Second Circuit. But if we were in the Second Circuit, that would be pretty much fatal to your position, wouldn't it?

MR. CASTANIAS: Oh, I guess I don't agree with that, because I think if you look at the *Cabiri* case, which I pointed out in my opening remarks, the *Cabiri* case makes clear that with regard to the, where a counterclaim would be available, waiver is not available. That's very clearly what Judge Jacobs held for the panel there.

The question of a counterclaim being available was not at issue in the Ministry of Supply case written by Judge Friendly. And I clerked in the Second Circuit and I have the greatest respect for Judge Friendly, but this case is not on point with ours. This is a case where they have a counterclaim, they litigated the counterclaim, it was available.

It was available to them. There was no need, no basis for invoking the waiver provision in this case.

THE COURT: Before we go on to the next case, I would ask that counsel submit to the court by Friday, December 19, an analysis of the *Rooker-Feldman* and abstention issues. I think that we would find that helpful.

In addition, subsequent to this oral argument, if you would have both this and the argument to follow in 2201 to be transcribed and have a transcript prepared for the court.

MR. CASTANIAS: We will, your Honor.

Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153-0119
(212) 310-8000
(212) 310-8007 (fax)

December 18, 2003

BY FEDERAL EXPRESS

Marcia M. Waldron,
Clerk United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: Saudi Basic Industries Corp. v. Exxon Mobil Corp., Case No. 02-2130

Dear Ms. Waldron:

I. INTRODUCTION.

As directed by the Court at oral argument on December 9 (*see* Tr. at 46:10-13, 81:11-14), Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc., and Mobil Petrochemical Company, Inc. (collectively, "ExxonMobil") submit this letter to address the Court's questions relating to the *Rooker-Feldman* doctrine and *Colorado River* abstention. As explained below, ExxonMobil agrees with Appellant Saudi Basic Industries Corporation ("SABIC") that the *Rooker-Feldman* doctrine has no current application to this case. (*See id.* at 11:19-23.) As for *Colorado River* abstention, the District Court's refusal in April 2002 of SABIC's request for abstention, is a non-final ruling that need not be revisited at this time because the District Court has, in fact, stayed the litigation below.

Instead, ExxonMobil continues to believe that the Court should stay resolution of this appeal pending disposition of related proceedings in the Delaware Supreme Court, which may well render moot not only those issues and the foreign sovereign immunity question now before the Court, but indeed the entirety of the underlying litigation.

II. BACKGROUND.

A. The Underlying New Jersey Actions.

The litigation history between the parties began on October 26, 1998, when SABIC filed Civil Action No. 98-4987 in the United States District Court for the District of New Jersey ("NJ-I"). On August 8, 2000, ExxonMobil filed Civil Action No. 00-3841 against SABIC in the same District Court ("NJ-II").

Though NJ-I and NJ-II have been consolidated for all purposes, this appeal arises from the District Court's denial of SABIC's motion to dismiss ExxonMobil's claims in NJ-II under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq*. ExxonMobil's Complaint in NJ-II alleged that SABIC had breached certain Joint Venture Agreements between SABIC and ExxonMobil by overcharging their two joint ventures, Saudi-Yanbu Petrochemical Company ("YANPET") and Al Jubail Petrochemical Company ("KEMYA"), licensing fees for use of certain technology to manufacture polyethylene.

B. The Related Delaware Case.

SABIC filed suit in the Superior Court for the State of Delaware in and for New Castle County, Civil Action No. OOC-07-161 ("Delaware Case") on July 24, 2000, seeking a declaration that it had not overcharged YANPET or KEMYA in breach of the Joint Venture Agreements. The ExxonMobil defendants in Delaware raised several counterclaims seeking to recover the overcharged amount; as in NJ-II, the Delaware

counterclaims alleged that SABIC had breached the Joint Venture Agreements by overcharging YANPET and KEMYA for their use of technology to manufacture polyethylene. SABIC itself filed the Delaware Case and, accordingly, its alleged sovereign immunity under the FSIA is simply not at issue there.

On March 21, 2003, the jury in the Delaware Case found that SABIC had wrongfully overcharged both YANPET and KEMYA, in breach of its express contractual obligations owed directly to the ExxonMobil defendants in the United States under the Joint Venture Agreements, and awarded damages in the amount of $416,880,764. SABIC has appealed that judgment to the Delaware Supreme Court (Case No. 493, 2003).

C. The Relevant Proceedings Below.

SABIC moved to dismiss ExxonMobil's Complaint in NJ-II, raising FSIA immunity and also urging the District Court to abstain, in favor of the Delaware Case, under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). ExxonMobil, in turn, moved to consolidate NJ-I and NJ-II, in part because the overcharge issue was common to both actions. On April 3, 2002, the New Jersey District Court denied SABIC's motion to dismiss or abstain and granted ExxonMobil's motion to consolidate. The denial of SABIC's motion to dismiss on FSIA grounds is the subject of this appeal.

There are ***two stays*** currently in effect in the District Court. On June 5, 2002, the District Court granted SABIC's motion to stay all proceedings in NJ-II pending the outcome of this appeal. (6/5/02 Order at 2 (Tab A).) On June 26, 2003, the District Court stayed proceedings in the consolidated cases pending the outcome of the appeal in the Delaware Case (6/26/03 Order (Tab B)), which ExxonMobil has asserted is

dispositive of SABIC's NJ-I claims under the equitable doctrine of unclean hands.

D. Prior Proceedings in this Court.

Because the proceedings in the Delaware Case may ultimately prove dispositive of this appeal, on July 9, 2003, ExxonMobil filed a motion to stay proceedings in this Court. As ExxonMobil then explained, if the Delaware verdict is affirmed, ExxonMobil will dismiss NJ-II, and the FSIA issues will become entirely moot. Only if SABIC is successful on appeal in Delaware, and only if the nature of any reversal or remand leaves open the possibility of a trial in NJ-II, would it then become necessary to address SABIC's FSIA arguments.

On August 5, 2003, a motions panel of this Court granted ExxonMobil's motion to stay. (8/5/03 Order (Tab C).) SABIC moved on October 24, 2003 to lift the stay, arguing that this case (No. 02-2130) should be argued together with SABIC's unrelated interlocutory appeal in NJ-I (No. 03-2201); ExxonMobil maintained that the stay was appropriate and that lifting the stay would unnecessarily tax the Court's resources over a matter that could well become moot. On November 12, 2003, the Court granted SABIC's motion to lift the stay in this case (11/12/03 Order (Tab D)), and the two appeals were argued together on December 9, 2003.

E. Questions Posed by the Court and ExxonMobil's Answers.

On December 8, 2003, the Court advised the parties of two issues it wished to have addressed at the oral argument:

1. Whether the District Court has jurisdiction over this case notwithstanding the Rooker-Feldman Doctrine, which precludes a federal court from hearing claims that have been already litigated in state court?

2. Whether the District Court should apply the Colorado River Abstention Doctrine to this case, and

either stay or dismiss the case pending the outcome of SABIC's appeal of the Delaware Superior Court judgment in Exxon's favor?

(12/8/03 Letter (Tab E).)

For the reasons explained below, ExxonMobil answers the Court's questions as follows:

1. Yes, the District Court has jurisdiction over this case notwithstanding the *Rooker-Feldman* doctrine. Furthermore, in order to avoid a *Rooker-Feldman* problem from arising in the future, the District Court has appropriately stayed all proceedings in NJ-II pending the outcome of this appeal and of the appeal in the Delaware Case.

2. No, the District Court need not apply the *Colorado River* abstention doctrine to this case, because the District Court has already stayed the case on other grounds. This Court, likewise, should stay this appeal in order to avoid rendering an unnecessary advisory opinion on the FSIA issues SABIC has raised.

III. EXPLANATION OF EXXONMOBIL'S ANSWERS.

A. The *Rooker-Feldman* Doctrine Has No Application to this Case.

The District Court has jurisdiction over ExxonMobil's claims in NJ-II, notwithstanding the judgment in Delaware, because ExxonMobil has not asked the District Court to take any action that would undermine, or be inconsistent with, the judgment in the Delaware Case. As SABIC acknowledges, "at this point" NJ-II "would not present directly a Rooker-Feldman problem . . . because ExxonMobil isn't asking the district court in this case to do anything; the matter is stayed." (Tr. at 11:18-23.) ExxonMobil agrees.

This Court has explained the *Rooker-Feldman* doctrine[1] as follows:

> [A] claim is barred by *Rooker-Feldman* under two circumstances: first, if the claim was "actually litigated" in state court prior to the filing of the federal action or, second, if the claim is "inextricably intertwined with [the] state adjudication," meaning that "federal relief can only be predicated upon a conviction that the state court was wrong."

Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 419 (3d Cir. 2003) (citations omitted). Neither circumstance is present here.

First, the "actually litigated" circumstance does not trigger *Rooker-Feldman* in this case, because the judgment in the Delaware Case did not issue "prior to the filing of the federal action." *See id.* ExxonMobil filed NJ-II on August 8, 2000, but the Delaware Case did not reach final judgment until more than two-and-a-half years later, on March 21, 2003.

Second, the "inextricably intertwined" circumstance also has no application. *Desi's Pizza* explains the two sub-circumstances that can give rise to this aspect of *Rooker-Feldman*:

> A plaintiff's claim for relief in a federal action is "inextricably intertwined" with an issue adjudicated by a state court under two circumstances: (1) "when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously

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[1] The *Rooker-Feldman* doctrine, derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), "is based on 'the well-settled understanding that the Supreme Court of the United States, and not the lower federal courts, has jurisdiction to review a state court decision.'" *Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 419 (3d Cir. 2003) (quoting *Parkview Assocs. P'ship. v. City of Leb.*, 225 F.3d 321, 324 (3d Cir. 2000)).

entered" and (2) when "the federal court must . . . take action that would render [the state court] judgment ineffectual."

Id. at 421 (citations omitted). In this case, ExxonMobil has not asked the District Court to determine that the judgment in the Delaware Case was "erroneously entered"—indeed, as the victor in Delaware, ExxonMobil would never seek such relief. Likewise, ExxonMobil has every incentive and intention of defending and enforcing the judgment in the Delaware Case and no intention of rendering it "ineffectual."

Both parties are thus in agreement that in the present circumstances there is no basis for a jurisdictional dismissal of NJ-II based upon *Rooker-Feldman*. At most, there are speculative future scenarios under which ExxonMobil would be potentially precluded from pursuing NJ-II if the Delaware Supreme Court vacates the trial court's judgment.[2] (*See* Tr. at 13:3-7 (SABIC's argument that *Rooker-Feldman* may apply "***[i]f***" ExxonMobil in the future asks the District Court to "review[] a judgment of the Delaware court") (emphasis added).) Such speculation is an insufficient basis to conclude now that the District Court lacks jurisdiction, especially when ExxonMobil has represented that it will not pursue relief in NJ-II that is barred by issue or claim preclusion based on the final result in Delaware.[3] As SABIC has suggested, "the

[2] For example, if the Delaware Supreme Court reversed the judgment based on a finding that SABIC never overcharged YANPET or KEMYA, ExxonMobil could not (and would not) ask the District Court in NJ-II to review that finding. On the other hand, as the Court observed during oral argument (*see* Tr. at 8:17-18), if the verdict in the Delaware Case is reversed on procedural grounds, then ExxonMobil's pursuit of NJ-II would not necessarily pose any *Rooker-Feldman* conflict.

[3] Furthermore, even if the circumstances of *Rooker-Feldman* were otherwise present, the fact that Exxon Mobil Corporation is a plaintiff in NJ-II, but was not named in the Delaware Case, renders the doctrine inapplicable at least as to that party. *See Nat'l R.R. Passenger Corp. v. Pa. Pub. Utility Comm'n*, 342 F.3d 242, 256 (3d Cir. 2003) (declining to apply *Rooker-Feldman* doctrine where plaintiff in federal action "was not even a party in the Commonwealth Court proceeding").

district court" should "consider these matters in the first instance" when and if there is a reason for it to do so. (*See id.* at 13:11-13.) There is no reason for it to do so now.

B. The Court Should Renew the Stay of this Appeal Rather Than Review the District Court's Denial of *Colorado River* Abstention.

In light of the stays the District Court has already ordered, no further action is required in that court to maintain the *status quo*, and there is therefore no reason to revisit the District Court's interlocutory denial of *Colorado River* abstention. The same considerations that prompted this Court to raise the abstention question do, however, warrant a renewed stay of this appeal.

As a threshold matter, the District Court conducted a thorough analysis of the *Colorado River* abstention arguments that SABIC initially raised and concluded that abstention was not appropriate. *See Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F. Supp. 2d 378, 412-14 (D.N.J. 2002). Of the six factors to be considered under *Colorado River* and *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 25-26 (1983), three favored ExxonMobil, one favored SABIC, and the other two were neutral. *See generally Saudi Basic*, 194 F. Supp. 2d at 412-14.[4] Pivotal in the District

[4] The six factors considered by the District Court, as set forth in *Colorado River* and *Moses H. Cone*, were: (1) whether one court first obtained *in rem* (or *quasi in rem*) jurisdiction over property involved in the litigation; (2) inconvenience of the federal forum; (3) desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction is obtained by the concurrent forums; (5) whether federal or state law applies; and (6) the adequacy of the state court proceeding. *See* 194 F. Supp. 2d at 412. As to each of these factors, the District Court found, respectively, that: (1) neither court had *in rem* or *quasi in rem* jurisdiction over property, so the first consideration was "inapplicable"; (2) the federal

Court's analysis was that SABIC had filed NJ-I in New Jersey ***two years before SABIC filed the Delaware Case***, and "the overcharge issue was already being litigated" as a defense "in the NJ I action when SABIC filed the Delaware action." *Id.* at 414 & n.15. Recognizing the Supreme Court directive that the "'balance'" is "'heavily weighted'" against abstention, *see id.* at 412 (quoting *Moses H. Cone*, 460 U.S. at 16), the District Court found that the fact-specific inquiry did not support abstention in this case.

Nevertheless, after SABIC appealed the District Court's simultaneous ruling that SABIC was not entitled to foreign sovereign immunity, the District Court stayed NJ-II pending the appeal to this Court. (*See* 6/5/02 Order at 2 (Tab A).) After the Delaware verdict, the District Court entered a second stay pending SABIC's appeal to the Delaware Supreme Court. (*See* 6/26/03 Order (Tab B).) Thus, even in the absence of a finding that *Colorado River* abstention was warranted, the District Court has already held that it will not entertain ExxonMobil's claims in NJ-II at least until after the various pending appeals are resolved. There is no need for any further action in the District Court in order to "hold things in abeyance," which is precisely what SABIC says it wants. (*See* Tr. at 10:1-3.)

This Court therefore need not review the District Court's rejection of *Colorado River* abstention or remand the case for

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forum in New Jersey was "not inconvenient," a factor that "weighs in favor of this Court not abstaining"; (3) because of the earlier-filed "closely related matter" in NJ-I, "greater judicial economy is served by adjudicating these cases in this forum rather than in Delaware"; (4) "the NJ-I action, in which the overcharge issue was already being litigated, was filed before the Delaware action," a finding that weighs against abstention; (5) the applicability of Saudi Arabian law was a "neutral" factor; and (6) "the state proceedings are adequate." *See id.* at 413-14. Nothing has changed since the District Court's April 2002 decision that alters the analysis under any of these factors.

the District Court to conduct any further analysis.[5] Instead, this Court should extend the stay so that it encompasses not only the proceedings in the District Court, but also this appeal, in order to avoid expending judicial resources that may be entirely unnecessary if the Delaware judgment is affirmed. *See, e.g., Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

At oral argument, the Court aptly asked the question, "why are we here?" (*See* Tr. at 38:15.) The answer to that question is that SABIC brought us here, not only by filing this appeal, but by insisting that the appeal move forward even though it may well become moot. If the Court wishes to avoid unnecessary proceedings, then as SABIC acknowledges "we get to the same place if you stay the appeal." (*See id.* at 42:5-6.) SABIC wishes to press for continued litigation only on that portion of NJ-II that it wants to pursue (this appeal), while joining in the call for a stay of the underlying case. The Court should reject that contradictory approach in favor of a stay that is consistent with the District Court's stay pending the outcome of the Delaware Case.

IV. CONCLUSION.

For the reasons set forth above, ExxonMobil respectfully suggests that there is no need for further evaluation of the *Rooker-Feldman* doctrine and no need or basis for the Court

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[5] Indeed, while an order ***granting*** *Colorado River* abstention is immediately appealable if it "has the practical effect of a dismissal," *see, e.g., Michelson v. Citicorp Nat'l Servs., Inc.*, 138 F.3d 508, 513 (3d Cir. 1998), an order ***denying*** abstention is not a final order and may not be reviewed until after final judgment. Accordingly, as a matter of appellate jurisdiction, the District Court's denial of *Colorado River* abstention, which is a discretionary decision in any event, *see id.* at 516, is not before this Court.

to require the District Court to reconsider *Colorado River* abstention. Instead, the Court should re-enter the stay of this appeal pending the outcome of the Delaware Case.

Respectfully,

/s/ James W. Quinn

Attachments

cc: (All w/attachments.)
Hon. Thomas L. Ambro (by FedEx through Clerk)
Hon. Julio M. Fuentes (by FedEx through Clerk)
Hon. Michael Chertoff (by FedEx through Clerk)
Gregory A. Castanias (by FedEx)
Kenneth R. Adamo/Michael W. Vary (by FedEx)
Elizabeth J. Sher (by FedEx)
Andrew S. Pollis/David J. Michalski (by FedEx)
K.C. Johnson (by FedEx)

JONES DAY
51 LOUISIANA AVENUE, N.W.
WASHINGTON, D.C. 20001-2113
TELEPHONE: 202-879-3939 FACSIMILE: 202-626-1700

WRITER'S DIRECT NUMBER
(202) 879-3639
gcastanias@JonesDay.com

December 18, 2003

VIA FEDERAL EXPRESS

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: ExxonMobil Corp. v. SABIC (No. 02-2130)

Dear Ms. Waldron:

At the conclusion of argument in the above-captioned case, which is referred to in the parties' briefs as the "NJ-II" matter, the panel (Ambro, Fuentes, and Chertoff, JJ.) requested that each party submit a letter brief of no more than 10 pages analyzing the Rooker-Feldman jurisdictional and Colorado River abstention issues presented by this case. Below is appellant SABIC's brief on these issues. Please distribute copies of this letter brief to Judges Ambro, Fuentes, and Chertoff.

* * *

The Foreign Sovereign Immunities Act (FSIA) and the Rooker-Feldman doctrine afford separate and independent bases for dismissing the NJ-II matter now, without remand,

because under either it is clear that subject-matter jurisdiction over the NJ-II suit is lacking. As SABIC's opening and reply FSIA briefs fully set out, subject-matter jurisdiction is lacking in NJ-II because (1) the ExxonMobil plaintiffs did not experience a direct and immediate loss in the United States; and (2) the FSIA only allows ExxonMobil to respond to SABIC's Delaware suit with counterclaims in the Delaware action (which ExxonMobil did); it does not allow ExxonMobil to file an entirely new lawsuit, the NJ-II action, on the same dispute. As set out in Part I below, subject-matter jurisdiction is also lacking under the Rooker-Feldman doctrine because ExxonMobil has conceded that it is maintaining its federal action for the sole purpose of relitigating its overcharge claims in the event that the Delaware Supreme Court reverses ExxonMobil's state-court jury verdict. Part II, below, further explains that, if this Court should hold that subject-matter jurisdiction is proper despite the FSIA and Rooker-Feldman problems with ExxonMobil's suit, it should remand the case with a direction that the district court consider staying this suit pursuant to the Colorado River abstention doctrine.

I. If The Court Rules That SABIC Is Not Immune From Suit Under The FSIA, This Court Should Dismiss Pursuant To The Rooker-Feldman Doctrine

If this Court determines that SABIC is not immune from suit under the FSIA, the Rooker-Feldman doctrine provides a separate and independent jurisdictional basis for dismissing ExxonMobil's suit. See, e.g., District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). The Rooker-Feldman doctrine prevents lower federal courts from "sitting in direct review of the decisions of a state tribunal"—an action that would offend "the well-settled understanding that the Supreme Court of the United States, and not the lower federal courts, has jurisdiction to review a state court decision."

Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 419 (3d Cir. 2003) (internal citations and quotation marks omitted); accord, e.g., Guarino v. Larsen, 11 F.3d 1151, 1156-57 (3d Cir. 1993) ("District courts lack subject matter jurisdiction once a state court has adjudicated an issue because Congress has conferred only original jurisdiction not appellate jurisdiction on the district courts."). At oral argument, counsel for ExxonMobil admitted: (1) that its claims in this action are "essentially the same" as those already litigated in the Delaware Superior Court (Tr. 26; see also EB 21 (claims are "identical"))*; and (2) that ExxonMobil is maintaining its NJ-II federal suit solely as an "insurance policy" in the event that the Delaware Supreme Court were to reverse ExxonMobil's jury verdict (Tr. 28-29). These admissions make clear the Rooker-Feldman jurisdictional defect in ExxonMobil's claim.

A putative federal claim is barred by Rooker-Feldman under either of two circumstances: *First*, if the claim has been "actually litigated" in state court; or *second*, if the claim is "inextricably intertwined with adjudication by a state's courts," that is, "'[w]here federal relief can only be predicated upon a conviction that the state court was wrong.'" Parkview Assocs. P'ship v. City of Lebanon, 225 F.3d 321, 325 (3d Cir. 2000) (quoting Centifanti v. Nix, 865 F.2d 1422, 1430 (3d Cir. 1989)). By ExxonMobil's own admission, *both* conditions are met here.

ExxonMobil conceded at argument that the overcharge claims that make up its federal cause of action are identical to those tried to judgment in the Delaware Superior Court. (See

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* The following conventions are used for citations throughout this brief: citations to SABIC's opening brief in appeal No. 02-2130 are "SB ___"; citations to ExxonMobil's brief in appeal No. 02-2130 are "EB __"; citations to the Joint Appendix in appeal No. 02-2130 are "A__"; and citations to the transcript of the December 9, 2003 oral argument are "Tr. ___".

Tr. 26; see also EB 21) Thus, these claims have been "actually litigated" because they were "present[ed]" to the Delaware Superior Court and "decid[ed]" by that court. Parkview Assocs., 225 F.3d at 325-26. Even if there were some minor difference between the claims brought in the federal court and those tried to judgment in Delaware—and ExxonMobil says there are none - the claims are, at the very least, "inextricably intertwined."

The slight wrinkle in the application of the Rooker-Feldman doctrine in this instance is that ExxonMobil prevailed on its claims in the Delaware Superior Court. Thus, at this moment in time, ExxonMobil is not asking a federal court to review (and potentially reverse) the Delaware judgment. This temporal wrinkle, however, does not preclude immediate application of the Rooker-Feldman doctrine. In this case, ExxonMobil has admitted that its sole reason for maintaining the federal action is as a sort of "insurance policy" in the event that the Delaware Supreme Court reverses the state-court jury verdict. (Tr. 28-29) Indeed, ExxonMobil stated that it would dismiss the federal claim if the Delaware Supreme Court affirms. (Tr. 27; see also EB 14 n.5) If the Rooker-Feldman doctrine bars a lower federal court from exercising jurisdiction where the *effect* would be direct review of a state-court decision (and it does), surely it bars ExxonMobil from maintaining a suit for the *sole and express purpose* of obtaining review of a state-court decision if and when that decision becomes adverse to ExxonMobil.

SABIC further notes that, as explained at argument, there is a distinct possibility that the Delaware Supreme Court will remand to the Delaware Superior Court for a reconsideration of SABIC's post-trial motions in light of a statement of Saudi Arabian law issued by the Saudi Arabian Government. (Tr. 10) If the Superior Court were to then reverse the jury verdict, a Rooker-Feldman problem would immediately arise because ExxonMobil would then necessarily be seeking

review of an adverse state-court decision in this federal action. Any ExxonMobil appeal to the Delaware Supreme Court would not eliminate the problem. "[T]he Rooker-Feldman doctrine applies with equal force when litigants seek federal review of the orders of lower state courts," even if those orders are the subject of an appeal in the state courts. Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. and N.J. Police Dep't, 973 F.2d 169, 177 (3d Cir. 1992); accord In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 140 (3d Cir. 1998).

At oral argument, ExxonMobil suggested that the Rooker-Feldman doctrine cannot apply to ExxonMobil Corporation because it is not a party to the Delaware action. (Tr. 26-27) This is wrong. It is true that the Rooker-Feldman doctrine does not extend to "persons not parties to the proceedings before the state . . . court." Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992); see Johnson v. De Grandy, 512 U.S. 997, 1006 (1994). But, as this Court has noted, this limiting principle derives from, and is co-extensive with, the "legal concepts of claim and issue preclusion." Valenti, 962 F.2d at 297. Claim and issue preclusion may be invoked against a party and those *in privity with* a party. See, e.g., Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 966 (3d Cir. 1991). Federal courts, including this one, repeatedly have held that parent corporations and their wholly owned subsidiaries are in privity for preclusion purposes, particularly when their interests are perfectly aligned in litigation. See, e.g., Lubrizol, 929 F.2d at 966; Doe v. Urohealth Sys., Inc., 216 F.3d 157, 162-63 (1st Cir. 2000); In re Imperial Corp. of Am., 92 F.3d 1503, 1507-08 (9th Cir. 1996). That is precisely the case here.

Exxon Chemical Arabia, Inc. ("ECAI") and Mobil Yanbu Petrochemical Co. ("Mobil Yanbu")—the ExxonMobil entities who are parties to the Delaware litigation and to the federal action—are each wholly owned subsidiaries of

ExxonMobil Corporation. (See SB 4-5) Furthermore, as ExxonMobil conceded at oral argument, all of its rights to recovery via the overcharge claims are derivative of ECAI's and Mobil Yanbu's ability to recover. (Tr. 33-34) Thus, ExxonMobil's interests vis-à-vis the overcharge claims are identical to those of ECAI and Mobil Yanbu, as ExxonMobil's counsel recognized at argument when he stated that "*we* can only collect the $417 million once." (Tr. 27 (emphasis added)) Moreover, the same attorneys representing ExxonMobil Corporation in the federal action represent ECAI and Mobil Yanbu in the Delaware action. There simply can be no serious debate that ExxonMobil Corporation is in privity with ECAI and Mobil Yanbu for purposes of claim and issue preclusion, and therefore is in privity with ECAI and Mobil Yanbu for purposes of the Rooker-Feldman doctrine.

In sum, this Court can, and should, dismiss this case now pursuant to the Rooker-Feldman doctrine. SABIC notes that this dismissal, like any dismissal for lack of subject-matter jurisdiction, would be without prejudice. See, e.g., Figueroa v. Buccaneer Hotel. Inc., 188 F.3d 172, 182 (3d Cir. 1999); Korvettes, Inc. v. Brous, 617 F.2d 1021, 1024 (3d Cir. 1980). Thus, if the Delaware Supreme Court ultimately reverses the state-court jury verdict on a ground that does not raise a Rooker-Feldman bar to federal jurisdiction, ExxonMobil could bring a new federal action at that time—assuming, of course, that no other jurisdictional impediment, such as claim or issue preclusion, existed. But given ExxonMobil's candid admission that it brought this federal action solely as a means of relitigating its overcharge claims if the Delaware Supreme Court reverses, this Court should dismiss this action without prejudice pursuant to the Rooker-Feldman doctrine.

II. Even If This Court Should Hold That Subject-Matter Jurisdiction Exists, Any Remand Should Be Accompanied With Instructions Directing The District Court To Consider A Renewed Motion To Stay The NJ-II Action Pursuant To The Colorado River Abstention Doctrine

In the event that this Court were to rule against SABIC on the FSIA and Rooker-Feldman issues, any remand to the district court should then direct the court to consider staying NJ-II pursuant to the Colorado River abstention doctrine.

As explained at oral argument (Tr. 4), SABIC originally moved before the district court in August 2000 to abstain under Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), with briefing on the matter completed in October 2000. The district court denied the motion as part of its April 3, 2002 order that also denied SABIC's motion to dismiss on FSIA grounds. (See A31-34 [SABIC v. ExxonMobil Corp., 194 F. Supp.2d 378, 411-14 (D.N.J. 2002)]) However, since the initial motion was made, much has changed—and dramatically so. *First*, ExxonMobil filed damages counterclaims in the Delaware action in January 2002; these counterclaims are, as ExxonMobil concedes, "identical" to the claims ExxonMobil brought in NJ-II. (EB 21) *Second*, ExxonMobil's counterclaims proceeded to a jury trial in March 2003, yielding a money judgment in ExxonMobil's favor in excess of $416 million. *Third*, the Delaware trial court denied SABIC's post-trial motions and, on September 2, 2003, entered a final judgment against SABIC, which is now on appeal to the Delaware Supreme Court. These dramatic changes now counsel strongly in favor of abstention pursuant to the Colorado River abstention doctrine.

Colorado River abstention "serve[s] the convenience of the federal courts" by "avoid[ing] duplicative litigation." 11A Wright & Miller, Federal Practice & Procedure § 4247

(2d ed. 1995). Simply put, it allows a federal court to stay an action where "there is a similar action pending in state court in which the controversy between the parties can be resolved." *Id.* The Colorado River analysis is two-tiered, focusing first on whether the "state action and the federal action[] are parallel." Spring City Corp. v. Am. Buildings Co., 193 F.3d 165, 171 (3d Cir. 1999). If so, the analysis turns to a balancing of a number of factors referred to in Supreme Court and Third Circuit cases:

> [1] "the desirability of avoiding piecemeal litigation";
> [2] "the order in which jurisdiction was obtained";
> [3] "whether federal or state law controls";
> [4] "whether the state court will adequately protect the interests of the parties";
> [5] "which court first assumed jurisdiction over property"; and
> [6] "the inconvenience of the federal forum."

Id. Notably, this list has expressly been recognized as not exclusive, and has been expanded by other courts on a case-by-case basis depending on the particular circumstances presented. See, e.g., Interstate Material Corp. v. City of Chicago, 847 F.2d 1285, 1288-89 (7th Cir. 1988). If, on balance, consideration of these factors favors the state forum, then the matter qualifies as an "exceptional case" that warrants the district court's stay of the federal proceeding. See, e.g., Vulcan Chemical Technologies, Inc. v. Barker, 297 F.3d 332, 341 (4th Cir. 2002).

Here, all agree that the NJ-II and Delaware matters are parallel. As ExxonMobil stated in its response brief to this Court, the two suits are "based upon precisely the same dispute" (EB 11) and raise "identical" claims (EB 21). Indeed, this is the very reason that ExxonMobil has repeatedly stated it will dismiss NJ-II should its $416 million verdict be affirmed in the Delaware matter. (See, e.g., Tr. 27; EB 14 n.5 (asserting that "ExxonMobil will dismiss NJ-II

once SABIC has exhausted its appellate rights in Delaware")) Moreover, as Judge Ambro correctly set out during argument, all of the Colorado River abstention factors either convincingly favor dismissal of NJ-II or are, at best for ExxonMobil, neutral. (Tr. 4-5)

Stay of NJ-II Would Avoid Piecemeal Litigation. This Court has admonished that the principal consideration under Colorado River abstention is the desirability of avoiding piecemeal litigation and, in particular, whether there is an "articulated congressional policy against piecemeal litigation in the specific context of the case under review." Ryan v. Johnson, 115 F.3d 193, 198 (3d Cir. 1997). This condition is unquestionably met here: Congress has made clear that district courts only possess original jurisdiction in civil disputes and may not—directly or in effect—review state-court final judgments. See, e.g., Rooker, 263 U.S. at 416. Were the district court to proceed with NJ-II at this juncture, the court would in effect be issuing interlocutory orders on issues of Saudi Arabian law and contract interpretation that would draw into question the Delaware Superior Court's final judgment. This would violate the congressional policy against federal-district-court review of state-court final judgments and, therefore, strongly counsels for stay of NJ-II upon remand.

Jurisdiction Was First Obtained in the Delaware Matter and That Case Has Proceeded to Final Judgment. The second Colorado River abstention factor likewise convincingly counsels for NJ-II's stay. This is particularly so given that this factor looks not only at the order in which the federal and state suits were filed, but also on "how much progress has been made in the two actions." Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 21 (1983). Not only was the Delaware action filed weeks before NJ-II (see SB 8, 10), but the Delaware action has now proceeded through discovery, pre-trial motions practice, trial, post-trial

motions practice, entry of a final judgment, and is now pending on appeal to the Delaware Supreme Court. By contrast, discovery in NJ-II is not even complete and the case has been stayed pending the outcome of this appeal for over a year and a half. Given the relative progress of the two cases, there can be no doubt that this second factor strongly counsels in favor of a stay of NJ-II pursuant to Colorado River abstention.

Delaware Is Plainly An Adequate Forum to Protect Exxon-Mobil's Interests. With respect to the third factor, Exxon-Mobil cannot reasonably contend that its interests are being anything but fully protected in Delaware state court. Not only has ExxonMobil to date received a final judgment for over $416 million, but ExxonMobil itself has repeatedly sought to stay this appeal (and thus delay any further adjudication of the NJ-II action) while it pursues the Delaware case, making absolutely plain that ExxonMobil in fact *prefers* litigating this overcharge dispute in Delaware. ExxonMobil *chose* to go forward in Delaware. Because ExxonMobil has itself expressed an eagerness to pursue the Delaware action rather than NJ-II, the adequacy of Delaware as a forum is not in dispute and the third Colorado River factor counsels for a stay.

The Remaining Colorado River *Factors Are Neutral As to Federal or State Forum*. The remaining factors have no bearing on whether a NJ-II should be stayed because those factors have no application to the particular facts here. For example, this case does not involve "jurisdiction over property," nor does it involve questions of "federal or state law," as Saudi Arabian law controls the merits of the dispute.

Given that *all* of the Colorado River considerations either strongly favor a stay or are neutral, the NJ-II action is precisely the sort of exceptional case over which the federal district court should stay its hand. Accordingly, should this Court find that subject-matter jurisdiction exists despite the

FSIA and the Rooker-Feldman doctrine, then this Court should instruct the district court on remand to consider whether to stay the case under the Colorado River abstention doctrine.

Respectfully submitted,

/s/ Gregory A. Castanias
Counsel for Appellant
Saudi Basic Industries Corp.

cc: Hon. Thomas L. Ambro
Hon. Julio M. Fuentes
Hon. Michael Chertoff
James W. Quinn, Esq.
Elizabeth J. Sher, Esq.
Andrew S. Pollis, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2003, a copy of SABIC's Letter Brief discussing Rooker-Feldman jurisdictional and Colorado River abstention issues was served, via United States first class mail, postage prepaid, upon each of the following:

Elizabeth J. Sher, Esq.
Pitney, Hardin, Kipp & Szuch LLP
200 Campus Dr.
Florham Park, NJ 07962
(973) 966-1550

Andrew S. Pollis, Esq.
Hahn Loeser & Parks LLP
3300 BP Tower
200 Public Square
Cleveland, OH 44114-2301
(216) 241-2824

James W. Quinn, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Ave.
New York, NY 10153
(212) 310-8000

/s/ William K. Shirey

(4)

No. 03-1696

Supreme Court, U.S.
FILED
JUL 23 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,
Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

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PETITIONERS' BRIEF

ANDREW S. POLLIS
DAVID J. MICHALSKI
HAHN LOESER & PARKS LLP
3300 BP Tower
200 Public Square
Cleveland, Ohio 44114
(216) 621-0150

ELIZABETH J. SHER
PITNEY HARDIN LLP
200 Campus Drive
Florham Park, New Jersey 07932
(973) 966-6300

JAMES W. QUINN
DAVID LENDER
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-7000

GREGORY S. COLEMAN
Counsel of Record
CHRISTIAN J. WARD
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

May the *Rooker-Feldman* doctrine, which bars federal district courts from conducting de facto appellate review of decisions by state courts, be expanded to incorporate preclusion principles and divest federal courts of jurisdiction solely because a pending state-court proceeding presents identical issues, notwithstanding the long-established system of dual federal and state jurisdiction?

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner Exxon Mobil Corporation has no parent corporations, and no publicly held corporation holds ten percent or more of its stock. Petitioner Exxon Chemical Arabia, Inc. is wholly owned by Exxon Overseas Corporation, which is wholly owned by Exxon Mobil Corporation. Petitioner Mobil Yanbu Petrochemical Company, Inc. is wholly owned by Mobil Petroleum Company Inc., which is wholly owned by Mobil International Petroleum Corporation, which is wholly owned by Mobil Corporation, which is wholly owned by Exxon Mobil Corporation.

Respondent Saudi Basic Industries Corporation (SABIC) is a Saudi Arabian corporation that is owned seventy percent by the Kingdom of Saudi Arabia and thirty percent by private investors. No publicly held corporation holds ten percent or more of its stock.

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IN THE

Supreme Court of the United States

No. 03-1696

EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,
Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

PETITIONERS' BRIEF

Petitioners request the Court to reverse the judgment of the United States Court of Appeals for the Third Circuit.

CITATION OF OPINIONS AND ORDERS

The court of appeals's opinion, Pet. App. 1a, is reported at 364 F.3d 102 (CA3 2004). The opinion of the district court, Pet. App. 11a, is reported at 194 F.Supp.2d 378 (D.N.J. 2002).

BASIS FOR JURISDICTION

The Third Circuit delivered its judgment and opinion on March 24, 2004. Petitioners invoke the Court's jurisdiction under 28 U.S.C. §1254. Petitioners timely filed their petition for writ of certiorari on June 22, 2004.

STATUTES INVOLVED

28 U.S.C. §1257 provides:

"(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

28 U.S.C. §1738 provides:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

The *Rooker-Feldman* doctrine creates a narrow and limited exception to the congressionally mandated structure of dual federal and state jurisdiction, and its sole role is to prohibit federal district courts from conducting de facto appellate review of state-court decisions. The Court should reject the Third Circuit's approach to *Rooker-Feldman*, which conflates the doctrine with ordinary preclusion principles and effectively nullifies concurrent federal jurisdiction over claims pending in parallel state litigation. The court of appeals dismissed ExxonMobil's claims under *Rooker-Feldman* even though (1) ExxonMobil has never attacked the Delaware state-court decision, a multi-million dollar trial-court judgment in ExxonMobil's favor; (2) there is no indication that ExxonMobil will ever use the federal proceeding to attack SABIC's still-pending appeal in the Delaware Supreme Court; and (3) claim preclusion is a waivable affirmative defense, not an outright bar to federal subject matter jurisdiction.

A. Factual Background

ExxonMobil's claims against SABIC arise from SABIC's conduct with regard to two joint ventures formed between SABIC and subsidiaries of ExxonMobil in 1980. SABIC and Mobil Yanbu Petrochemical Co. (Yanbu) formed a 50/50 joint venture, Yanbu Petrochemical Co., or Yanpet. Pet. App. 12a. In the same year, SABIC and Exxon Chemical Arabia, Inc. (ECAI) also formed a 50/50 partnership, Al-Jubail Petrochemical Co., or Kemya. Pet. App. 12a-13a. An overarching principle of the governing joint venture agreements was that the partners were not to profit at the joint ventures' expense, *see* Pet. App. 3a-4a, and one provision common to both joint venture agreements required the partners to pass through, at their actual cost, any technology procured for the benefit of the joint ventures. *See* Pet. App. 15a, 79a.

Nevertheless, when SABIC procured rights to the Unipol® process, a polyethylene manufacturing method licensed by Union Carbide Corporation, it secretly added a substantial mark-up to the sublicense fees it then charged to both Yanpet and Kemya. Pet. App. 3a, 15a. ExxonMobil first discovered the mark-up in 2000.

B. The Parallel Litigation in Federal and State Courts

In October 1998, SABIC filed a lawsuit (NJ-I) against ExxonMobil in New Jersey federal court claiming that Kemya was entitled to ownership of a certain patent related to an improvement to the Unipol® process. After learning that SABIC had overcharged Kemya for the Unipol® sublicense, ExxonMobil asserted the affirmative defenses of "unclean hands" and setoff. Pet. App. 12a. ExxonMobil later filed an action against SABIC in the New Jersey federal district court (NJ-II), seeking damages for SABIC's overcharges. Pet. App. 3a, 15a. The district court consolidated NJ-I and NJ-II. Pet. App. 12a, 76a. In the federal district court, SABIC moved for dismissal of NJ-II under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1602 *et seq*. Pet. App. 43a. Notably, SABIC never raised *Rooker-Feldman* as a basis for dismissal.[1] The district court denied SABIC's motion, Pet. App. 55a, and SABIC filed an interlocutory appeal to the Third Circuit. Pet. App. 3a.

In July 2000, one day after a failed mediation in NJ-I between the parties, and just before ExxonMobil filed NJ-II, SABIC filed suit against Yanbu and ECAI in Delaware state court seeking a declaratory judgment that its overcharging for the Unipol® sublicenses did not give rise to any liability. Pet.

[1] Indeed, at oral argument in the court of appeals, SABIC conceded that *Rooker-Feldman* does not apply in the circumstances of this case. JA 24-25.

App. 11a, 79a.[2] Yanbu and ECAI asserted counterclaims in the Delaware Superior Court for damages in tort and contract for SABIC's conduct in overcharging the joint ventures. Pet. App. 3a, 80a. While the federal appeal was pending, the parties agreed to proceed to trial in the Delaware forum selected by SABIC. *See* Pet. App. 86a (the Delaware trial court's conclusion that SABIC had "engaged in preemptive forum shopping" by filing its declaratory judgment action in Delaware and "in doing so, selected the forum in which it desired to have the overcharge issue decided"). After a two-week trial in March 2003, a Delaware jury returned a verdict finding that SABIC had overcharged the joint ventures in violation of the joint venture agreements and that SABIC had committed the Saudi-law tort of *ghasb* (usurpation), entitling ExxonMobil to compensatory damages that included the overcharges and disgorgement of the actual profits earned by SABIC from those overcharges. *See* Pet. App. 4a. The jury awarded, and the Delaware Superior Court entered judgment for, more than $416 million in damages to ExxonMobil. Pet. App. 4a. SABIC appealed the judgment, and the appeal remains pending in the Delaware Supreme Court. SABIC's Delaware appeal relies heavily on procedural arguments, especially assertions that ExxonMobil's claims were barred by the Delaware statute of limitations.

Concurrent with its Third Circuit appeal brief, ExxonMobil moved the court to stay the federal appeal pending the outcome of the Delaware posttrial and appellate proceedings, and the court granted the stay. JA 9-10. On November 12, 2003, although the Delaware proceedings were still pending, the court granted SABIC's motion to lift the stay and set the case for argument and submission. JA 11, 13. The day before oral argument, the court instructed the parties to be prepared to address the application of *Rooker-Feldman*. The

[2] The court of appeals incorrectly stated that SABIC's Delaware action was filed in September 2000. Pet. App. 3a.

court's questions at oral argument focused primarily on *Rooker-Feldman*, and the court requested post-argument letter briefs addressing the issue. JA 19-26, 33-35, 44-45, 47.

C. The Third Circuit's Application of *Rooker-Feldman*

In deciding SABIC's interlocutory appeal, the Third Circuit did not reach the FSIA question before it, but instead concluded that the *Rooker-Feldman* doctrine required dismissal of ExxonMobil's claims against SABIC in the federal action. Pet. App. 3a; *see also* Pet. App. 5a. The court of appeals first found that it had appellate jurisdiction, under the collateral-order doctrine, to review the district court's denial of SABIC's motion to dismiss on foreign sovereign immunity grounds. Pet. App. 4a-5a. Next, however, noting its "continuing obligation to *sua sponte* raise the issue of subject matter jurisdiction when it is in question," the court turned its attention to the *Rooker-Feldman* doctrine. Pet. App. 5a.

The court asserted that "a claim is barred by *Rooker-Feldman* under two circumstances: first, if the claim was 'actually litigated' in state court prior to the filing of the federal action or, second, if the claim is 'inextricably intertwined with [the] state adjudication.'" Pet. App. 5a (quoting *Desi's Pizza, Inc.* v. *City of Wilkes-Barre*, 321 F.3d 411, 419 (CA3 2003)) (alteration in original). Finding that "there is no dispute that ExxonMobil's claims are identical to the claims on which the Delaware Superior Court reached a final judgment," the court reasoned that this case "presents the 'paradigm situation in which *Rooker-Feldman* precludes a federal district court from proceeding.'" Pet. App. 6a (quoting *E.B.* v. *Verniero*, 119 F.3d 1077, 1090-91 (CA3 1997)).

The court of appeals did not expressly discuss state preclusion law, although its focus on whether ExxonMobil's claims had been "actually litigated" in the Delaware trial

court closely mirrors Delaware res judicata principles. *See, e.g.*, *Cassidy* v. *Cassidy*, 689 A.2d 1182, 1185 (Del. 1997). And, in a lengthy paragraph addressing ExxonMobil's argument that *Rooker-Feldman* could not, in any event, bar an entity that was not a party to the Delaware case, the court of appeals noted that *Rooker-Feldman* "has a close affinity to the principles embodied in the legal concepts of claim and issue preclusion." Pet. App. 7a. Concluding that ExxonMobil's claims had been "actually litigated" in the Delaware trial court, the court held that this circumstance was sufficient to "trigger *Rooker-Feldman*," Pet. App. 6a-7a, and asserted that it "need not analyze whether, under the alternative prong of the *Rooker-Feldman* doctrine, [the claims] were 'inextricably intertwined with a previous state court adjudication.'" Pet. App. 8a (quoting *Parkview Assocs. P'ship* v. *City of Lebanon*, 225 F.3d 321, 327 (CA3 2000)).

Nevertheless, the court proceeded to note its opinion that this case "presents an equally clear application of the 'inextricably intertwined' circumstance." *Id.* Speculating that SABIC's pending Delaware appeal might theoretically result in a judgment adverse to ExxonMobil, the court reasoned "[i]f that were to happen, ExxonMobil's federal action would squarely be seeking to invalidate a final judgment of the state court." Pet. App. 8a.[3]

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[3] In fact, even an adverse decision by the Delaware Supreme Court would not necessarily bar relitigation of ExxonMobil's claims under applicable preclusion principles. For example, as SABIC conceded in the Delaware Supreme Court, a reversal based on the Delaware statute of limitations—the primary argument SABIC has asserted on appeal—would not preclude ExxonMobil from litigating its substantive claims in another forum. *See* SABIC Reply, Case No. 493, 2003 in the Delaware Supreme Court at 6. Similarly, SABIC's challenges to the Delaware trial court's evidentiary rulings would, if successful, require another trial, not preclude one.

The court of appeals concluded that *Rooker-Feldman* bars ExxonMobil's claims in the federal district court "[b]ecause ExxonMobil's federal claims were identical to the claims in which the Delaware Superior Court reached a final judgment." *Id.* Accordingly, it remanded the case with instructions for the district court to dismiss for lack of subject matter jurisdiction. *Id.*

ExxonMobil petitioned the Court for a writ of certiorari to review the Third Circuit's judgment. The Court granted certiorari on October 12, 2004.

SUMMARY OF THE ARGUMENT

Misconstruing *Rooker-Feldman* as a panacea for all the tensions and inefficiencies in a structure that permits parallel state and federal jurisdiction over many identical or overlapping claims, the Third Circuit applied the doctrine in a manner that effectively eviscerates concurrent jurisdiction and supplants state preclusion law with a federal common law of res judicata. Properly understood, the *Rooker-Feldman* doctrine articulates the narrow jurisdictional principle that the subject matter jurisdiction bestowed by Congress on the lower federal courts does not include jurisdiction to review state-court decisions. Because ExxonMobil's claims in the federal district court do not challenge a state-court judgment, *Rooker-Feldman* has no application to this case.

Federal courts have a virtually unflagging obligation to exercise the jurisdiction entrusted to them by Congress, and it is not uncommon in our dual system for a federal district court to have concurrent subject matter jurisdiction with at least one state court. When concurrent jurisdiction exists, nonjurisdictional abstention and prudential doctrines may, in appropriate cases, mitigate tensions inherent in a system that permits parallel litigation of overlapping or identical claims in federal and state courts. Because those doctrines represent exceptions to a federal court's general duty to exercise its

jurisdiction, they are applied narrowly and only after careful consideration of whether they apply.

When concurrent jurisdiction exists, and when abstention or prudential dismissal of a federal action is found to be inappropriate after careful consideration of the relevant factors, parallel claims may proceed to judgment in state and federal courts. If the state court reaches judgment first, preclusion principles determine the effect of the state-court judgment in the federal action. Under congressional mandate and this Court's precedent, a federal court must make a preclusion determination in accordance with the preclusion law of the State that rendered the judgment at issue.

Rooker-Feldman is neither a broad exception to federal-state concurrent jurisdiction over parallel claims nor a mechanism for supplanting consideration of state-law preclusion principles with a federal common law of res judicata. The *Rooker-Feldman* doctrine derives from the congressional allocation of exclusive federal appellate jurisdiction over state-court judgments to this Court. Articulating the necessary inferences from that statutory structure, the *Rooker-Feldman* doctrine provides that a federal district court has no jurisdiction to entertain what is in substance a de facto appellate challenge to a state-court judgment, even if styled by the federal plaintiff as an "original" action. A federal claim is barred if it is "inextricably intertwined" with such a de facto appeal so that granting the relief requested by the federal plaintiff would necessarily require nullifying the state court's judgment.

Rooker-Feldman does not jurisdictionally bar a federal action simply because identical claims were previously litigated in state court, especially when—as in this case—the federal plaintiff prevailed on the merits in the only state-court adjudication that has previously been made. Nor can *Rooker-Feldman* properly bar a federal plaintiff's claims based on speculation that the federal plaintiff might, in the future,

attempt to challenge an adverse judgment that a state court might, in the future, render.

In this case, the court of appeals made two fundamental errors. First, it erroneously confused *Rooker-Feldman* with general preclusion principles and held that *Rooker-Feldman* was triggered simply because ExxonMobil's claims against SABIC had been "actually litigated" in the Delaware trial court, even though ExxonMobil's federal action is fully consistent with the Delaware judgment in ExxonMobil's favor. Second, misconstruing *Feldman*'s "inextricably intertwined" test, the court of appeals speculated that the Delaware Supreme Court might render a judgment adverse to ExxonMobil and—without any way of knowing the grounds on which the pending Delaware Supreme Court judgment might be based—reasoned that ExxonMobil's substantive claims against SABIC will necessarily be "inextricably intertwined" with the Delaware court's hypothetical future judgment.

The Third Circuit's reformulation of *Rooker-Feldman* has broad, negative implications for the dual federal-state jurisdictional structure. Consistently applied, the Third Circuit's approach to *Rooker-Feldman* would eviscerate concurrent jurisdiction. Because it relies on speculation that a federal plaintiff might attempt to challenge a judgment that a state court might render, the Third Circuit's version of *Rooker-Feldman* compels dismissal of a federal plaintiff's claims whenever identical claims are also pending in state court. Moreover, by conflating *Rooker-Feldman* with res judicata, the Third Circuit's approach elevates the waivable, affirmative defense of preclusion to jurisdictional status. And, at least as to claims that have already been actually litigated in state court, the Third Circuit's *Rooker-Feldman* approach circumvents consideration of state preclusion law, in contravention of congressional mandate as interpreted by this Court.

ARGUMENT

I. THE *ROOKER-FELDMAN* DOCTRINE FORBIDS DE FACTO APPEALS, NOT CONCURRENT FEDERAL-STATE JURISDICTION.

The court of appeals applied the *Rooker-Feldman* doctrine in an expansive and aggressive manner that divested the federal district court of subject matter jurisdiction simply because parallel claims had been previously litigated in a state trial court and were pending on appeal. In this case, SABIC challenged the federal district court's subject matter jurisdiction under the FSIA—a challenge that the district court rejected and the court of appeals did not reach. The court of appeals thus articulated no reason other than *Rooker-Feldman* to deprive the district court of subject matter jurisdiction. But *Rooker-Feldman*, properly understood, cannot deprive the district court of its concurrent jurisdiction over ExxonMobil's claims.

A. FEDERAL COURTS ARE ORDINARILY OBLIGED TO EXERCISE JURISDICTION, EVEN WHEN CONCURRENT WITH STATE-COURT JURISDICTION.

Congress has defined the original subject matter jurisdiction of the federal district courts. *E.g.*, 28 U.S.C. §§1330, 1331, 1332, 1333. It is not uncommon in our dual system for the jurisdiction of a federal court to be concurrent with that of at least one state court. *See, e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 928 (1975) ("[O]n occasion there will be duplicating and overlapping adjudication of cases which are sufficiently similar in content, time, and location to justify being heard before a single judge had they arisen within a unitary system."). And "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910); *accord, e.g.*, *Atl. Coast Line R.R. Co.* v. *Bhd. of Locomotive Eng'rs*, 398 U.S. 281,

295 (1970) ("[T]he state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.").

The federal courts' exercise of the concurrent jurisdiction Congress has entrusted to them is the general rule, subject only to narrow exceptions, like abstention. *See Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule."); *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976) (same). *Colorado River* summarized three forms of the abstention doctrine, none of which applies to this case: "Abstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Colo. River*, 424 U.S., at 814 (quoting *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 189 (1959), and citing, *inter alia*, *R.R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496 (1941)). "Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Id.* (citing *La. Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959), and *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943)). "Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings." *Id.*, at 816 (citing *Younger* v. *Harris*, 401 U.S. 37 (1971)). Because the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," *id.*, at 817, "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Id.*, at 817-18; *see*

Moses H. Cone, 460 U.S., at 16 ("[T]he decision whether to dismiss a federal action . . . does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.").

The Court has recognized that "inefficient simultaneous litigation in state and federal courts on the same issue" is "one of the costs of our dual court system." *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 524-25 (1986). "[T]he possibility of a race to judgment is inherent in a system of dual sovereigns and, in the absence of 'exceptional' circumstances, that possibility alone is insufficient to overcome the weighty interest in the federal courts exercising their jurisdiction over cases properly before them." *Green* v. *City of Tucson*, 255 F.3d 1086, 1097 (CA9 2001) (en banc) (internal citation omitted) (citing *Colo. River*, 424 U.S., at 818), *overruled in part on other grounds*, *Gilbertson* v. *Albright*, 381 F.3d 965 (CA9 2004). When the state court wins the "race to judgment," and the federal district court has subject matter jurisdiction over the federal plaintiff's substantive claims, interjurisdictional preclusion principles govern the question whether the federal action is permitted or is, instead, an attempt at relitigation precluded by the res judicata effect of the state-court adjudication. *See, e.g.*, *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 373 (1996). Under the Full Faith and Credit Act, 28 U.S.C. §1738, "[f]ederal courts may not 'employ their own rules . . . in determining the effect of state judgments,' but must 'accept the rules chosen by the State from which the judgment is taken.'" *Id.* (quoting *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982)).

B. THE *ROOKER-FELDMAN* DOCTRINE PROHIBITS ONLY DE FACTO APPEALS FROM STATE-COURT JUDICIAL DECISIONS.

Properly understood, *Rooker-Feldman* is neither a sweeping exception to the general rule requiring federal courts to exercise their jurisdiction nor the elevation of ordinary preclusion principles to jurisdictional status. Rather, *Rooker-Feldman* is an articulation of the narrow jurisdictional principle that Congress has not granted federal district courts subject matter jurisdiction to review decisions previously made by state courts. The *Rooker-Feldman* doctrine derives from two cases the Court decided sixty years apart, *Rooker* v. *Fid. Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). The essence of the doctrine is that federal district courts "do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings." *Feldman*, 460 U.S., at 486.

The plaintiffs in *Rooker* filed "a bill in equity to have a judgment of a circuit court in Indiana, which was affirmed by the Supreme Court of the State, declared null and void, and to obtain other relief dependent on that outcome." *Rooker*, 263 U.S., at 414. Entertaining the Rookers' suit to reverse or modify the Indiana Supreme Court's judgment would have been "an exercise of appellate jurisdiction" beyond the federal district court's reach because "[t]he jurisdiction possessed by the District Courts is strictly original." *Id.*, at 416. Thus, although no statute expressly declares that federal district courts are without jurisdiction to review state-court decisions, *Rooker* derived that rule by negative inference from the predecessors to 28 U.S.C. §1331 ("The district courts shall have *original jurisdiction* of all civil actions arising under the Constitution, laws, or treaties of the United States." (emphasis added)) and §1257 ("Final judgments or decrees rendered by the highest court of a State in which a

decision could be had, may be reviewed by the Supreme Court."). "Reduced to its essence, *Rooker* held that when a losing plaintiff in state court brings a suit in federal district court asserting as legal wrongs the allegedly erroneous legal rulings of the state court and seeks to vacate or set aside the judgment of that court, the federal suit is a forbidden de facto appeal." *Noel* v. *Hall*, 341 F.3d 1148, 1156 (CA9 2003). As *Atl. Coast Line* succinctly put it, "lower federal courts possess no power whatever to sit in direct review of state court decisions." 398 U.S., at 296.

Whereas *Rooker* articulated the principle that federal district courts lack subject matter jurisdiction to review direct attacks on state-court judgments, *Feldman* expounded on the rule announced in *Rooker*, articulating the test for when a purportedly independent federal suit is in fact a forbidden challenge to a state judgment. The two plaintiffs in *Feldman* had each, in separate proceedings, petitioned the District of Columbia Court of Appeals (which has the same status as a state supreme court, 28 U.S.C. §1257(b)) to waive a requirement for admission to the D.C. bar in their particular cases. *Feldman*, 460 U.S., at 465-69, 471-72. After the D.C. Court of Appeals denied both petitions, the plaintiffs filed (separate) suits in federal district court, each alleging that the D.C. court's denial of his waiver petition violated federal constitutional and statutory rights. *Id.*, at 469, 472-73. The district court dismissed those claims for lack of jurisdiction, and the U.S. Court of Appeals for the District of Columbia reversed, holding that the federal district court cases did not seek appellate review of a final judgment of a state court. *Id.*, at 474. The Court in *Feldman* distinguished between the plaintiffs' attack on the District of Columbia Court of Appeals's denial of their petitions for waiver, which were jurisdictionally barred, *id.*, at 486-87, and "[t]he remaining allegations in the complaints" alleging "a general attack on the constitutionality" of the rule, *id.*, at 487, which were not. *Id.*, at 483-84 n.16. *Feldman*'s holding that the general

constitutional claims were not jurisdictionally barred did not, however, prevent the district court from applying preclusion law to determine if those claims were barred by res judicata. *Id.*, at 487-88 & n.19.

"Since *Feldman*, the Supreme Court has provided [the lower courts] with little guidance in determining which claims are 'inextricably intertwined' with a prior state court judgment and which are not." *Moccio* v. *N.Y. State Office of Court Admin.*, 95 F.3d 195, 198 (CA2 1996). *Rooker* and *Feldman* remain the only two cases in which the Court has applied the doctrine to find that lower courts lacked jurisdiction. Since *Feldman*, the Court has addressed the doctrine briefly in a few cases. *See Verizon Md. Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002) (noting that *Rooker-Feldman* "has no application to judicial review of executive action, including determinations made by a state administrative agency"); *Johnson* v. *De Grandy*, 512 U.S. 997, 1005-06 (1994) (describing *Rooker-Feldman* as the doctrine "under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights"); *Howlett* v. *Rose*, 496 U.S. 356, 370 (1990) (describing *Rooker-Feldman* as "the rule that a federal district court cannot entertain an original action alleging that a state court violated the Constitution by giving effect to an unconstitutional state statute"); *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 622-23 (1989) (observing that the appeal from the Arizona Supreme Court would have been barred by *Rooker-Feldman* if it had instead been brought originally in a federal suit); *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 7, 10 (1987) (requiring abstention under *Younger*,

instead of applying *Rooker-Feldman*, in §1983 challenge to ongoing state civil proceedings).[4]

Although this Court has never equated *Rooker-Feldman* with general res judicata principles, some courts of appeals have largely elided the two concepts. *See, e.g.*, *Cruz* v. *Melecio*, 204 F.3d 14, 21 n.5 (CA1 2000) ("Only a state court adjudication that itself has preclusive effect can bring the *Rooker-Feldman* doctrine into play."); *Doctor's Assocs., Inc.* v. *Distajo*, 107 F.3d 126, 137 (CA2 1997) ("[T]he *Rooker-Feldman* doctrine 'at a minimum' is coextensive with preclusion principles." (quoting *Moccio*, 95 F.3d, at 199-200)); *Moccio*, 95 F.3d, at 200 ("[W]e decide whether the *Rooker-Feldman* doctrine applies to Moccio's claims by turning to preclusion principles."). Other courts have struggled to articulate the distinction between the two doctrines. *See, e.g.*, *Ingalls* v. *Erlewine* (*In re Erlewine*), 349 F.3d 205, 210 n.4 (CA5 2003) ("Our analysis here should not be taken to imply that the *Rooker-Feldman* doctrine is simply coextensive with traditional preclusion doctrine." (citing 18B CHARLES ALAN WRIGHT, *ET AL.*, FEDERAL PRACTICE & PROCEDURE §4469.1 (2d ed. 2002) (describing the subtle differences between the two bodies of law)); *Noel*, 341 F.3d, at 1162-63 (collecting cases expressing confusion about *Rooker-Feldman* and preclusion); *Hutcherson* v. *Lauderdale County*, 326 F.3d 747, 755 (CA6 2003) ("The two doctrines 'are not coextensive.'"); *see also Kamilewicz* v. *Bank of Boston Corp.*, 100 F.3d 1348, 1350 (CA7 1996) (Easter-

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[4] In *Pennzoil*, four concurring opinions expressly agreed that *Rooker-Feldman* did not bar the constitutional claims in that case, which did not attack the state court's judgment itself. *Pennzoil*, 481 U.S., at 18 (Scalia, J., concurring); *id.*, at 21 (Brennan, J., concurring); *id.*, at 28 (Blackmun, J., concurring); *id.*, at 31 n.3 (Stevens, J., concurring). Justice Marshall disagreed because, in his view, "determination of Texaco's claim for an injunction *necessarily* involved some review of the merits of its state appeal." *Id.*, at 26 (Marshall, J., concurring) (finding that *Rooker-Feldman* would apply).

brook, J., dissenting from denial of rehearing en banc) ("[A] judgment that is not entitled to full faith and credit does not acquire extra force via the *Rooker-Feldman* doctrine."); *compare Merrill Lynch Bus. Fin. Servs., Inc.* v. *Nudell*, 363 F.3d 1072, 1075 (CA10 2004) ("[W]e apply the *Rooker-Feldman* doctrine in a slightly broader fashion" than those circuits in which "the *Rooker-Feldman* doctrine is coextensive with preclusion doctrine."), *with Kenmen Eng'g* v. *City of Union*, 314 F.3d 468, 476 (CA10 2002) ("Rather than prohibiting the relitigation of issues and claims (the province of the preclusion doctrines), *Rooker-Feldman* protects state-court judgments from impermissible appellate review by lower federal courts.").

There is, in fact, almost certainly overlap—that is, some actions that are jurisdictionally barred by *Rooker-Feldman* would also be barred by preclusion doctrine, if jurisdiction existed for the federal court to apply preclusion. *See, e.g.*, *Am. Reliable Ins. Co.* v. *Stillwell*, 336 F.3d 311, 318 (CA4 2003). Indeed, a frequent scholarly criticism of *Rooker-Feldman* as applied by the lower courts is that the doctrine, in many cases, seems redundant with preclusion. *See* Barry Friedman & James E. Gaylord, Rooker-Feldman, *from the Ground Up*, 74 NOTRE DAME L. REV. 1129, 1142 (1999); Suzanna Sherry, *Judicial Federalism in the Trenches: The* Rooker-Feldman *Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1089 (1999). But, as *Feldman* itself makes clear, the doctrines are not simply coextensive, and the lower courts that have held otherwise are in error. Certain claims that may be barred by the affirmative defense of res judicata under state-law preclusion principles are plainly not jurisdictionally barred by *Rooker-Feldman*. *See Feldman*, 460 U.S., at 487-88 & n.19 (expressly reserving to the district court the question whether certain claims that were not barred by *Rooker-Feldman* were nevertheless barred by res judicata); *contra, e.g.*, *Moccio*, 95 F.3d, at 200 ("[S]ubsequent litigation of the claim will be barred under the *Rooker-Feldman*

doctrine if it would be barred under the principles of preclusion."). For example:

> "A sues B (a private employer) in state court for wrongful discharge. A loses. A then sues B on the same claim in federal court. . . . *Rooker-Feldman* has no relevance because it is simply A trying to get two bites at the apple, suing twice over the same conduct but not trying to attack or appeal the judgment in the earlier case." Jack M. Beermann, *Comments on* Rooker-Feldman *or Let State Law Be Our Guide*, 74 NOTRE DAME L. REV. 1209, 1214 (1999).

Preclusion principles might bar the second suit, but the *Rooker-Feldman* doctrine would not. *See Feldman*, 460 U.S., at 487-88 & n.19. *Rooker-Feldman* jurisdictionally bars federal claims only when they seek de facto review of the state court's prior adjudication. *See id.*, at 486-87.

II. THE COURT OF APPEALS MISAPPLIED *ROOKER-FELDMAN* TO EXXONMOBIL'S CLAIMS, WHICH DO NOT ATTACK A STATE-COURT JUDGMENT.

Because ExxonMobil's suit in federal court does not contest—in any way, shape, or form—the Delaware trial court's judgment, *Rooker-Feldman* is simply inapplicable. That should have been the beginning and the end of the court of appeals's *Rooker-Feldman* inquiry.

A. THE COURT OF APPEALS ERRONEOUSLY CONFLATED *ROOKER-FELDMAN* WITH ORDINARY PRECLUSION PRINCIPLES BASED SOLELY ON THE IDENTITY OF CLAIMS IN THE STATE AND FEDERAL PROCEEDINGS.

The court of appeals began its erroneous analysis by demonstrating a fundamental misunderstanding of the standard articulated in *Feldman*. The court stated that "a claim is

barred by *Rooker-Feldman* under two circumstances: first, if the claim was 'actually litigated' in state court prior to the filing of the federal action or, second, if the claim is 'inextricably intertwined with [the] state adjudication.'" Pet. App. 5a (quoting *Desi's Pizza*, 321 F.3d, at 419) (alteration in original). In fact, *Rooker-Feldman* properly applies in only *one* circumstance—when the federal plaintiff *challenges* the substance of a previous state-court decision, regardless whether that challenge involves claims that were "actually litigated" previously or claims that are merely "inextricably intertwined" with the previous adjudication. *See Noel*, 341 F.3d, at 1158 ("Only when there is already a forbidden de facto appeal in federal court does the 'inextricably intertwined' test come into play."). The "inextricably intertwined" test is not, as the court of appeals characterized it, "an alternative prong of the *Rooker-Feldman* doctrine." Pet. App. 8a. *Rooker-Feldman* has only one "prong"—prohibiting de facto federal appeals of state-court judgments. "In determining the applicability of the *Rooker-Feldman* doctrine, federal courts 'cannot simply compare the *issues* involved in the state-court proceeding to those raised in the federal-court plaintiff's complaint,' but instead 'must pay close attention to the *relief* sought by the federal-court plaintiff.'" *Hood* v. *Keller*, 341 F.3d 593, 597 (CA6 2003) (quoting *Bianchi* v. *Rylaarsdam*, 334 F.3d 895, 900 (CA9 2003)); *Kenmen*, 314 F.3d, at 476.

Feldman does not expand the doctrine announced in *Rooker* to cover an additional category of cases. It merely clarifies that the jurisdictional bar encompasses claims that are, in substance, de facto appeals of state-court judgments even when federal plaintiffs are less forthright about their intention to nullify a state judgment than the Rookers were in their direct attack on the Indiana Supreme Court's judgment. "The premise for the operation of the 'inextricably intertwined' test in *Feldman* is that the federal plaintiff is seeking

to bring a forbidden de facto appeal." *Noel*, 341 F.3d, at 1158. If a federal suit is, in substance, an appeal of a state-court judgment, a federal district court lacks subject matter jurisdiction because Congress has granted appellate jurisdiction over state-court judgments to this Court only. *See Feldman*, 460 U.S., at 476.

The court of appeals's inapt focus on the assertion that the Delaware trial court had "actually litigated" issues identical to those raised in ExxonMobil's claims in the federal suit diverted its attention from the real question at the core of a *Rooker-Feldman* inquiry—whether the *relief* sought by ExxonMobil in its federal suit is the nullification of a state-court decision previously made. *Compare* Pet. App. 8a (applying *Rooker-Feldman* simply "[b]ecause ExxonMobil's federal claims were identical to the claims in which the Delaware Superior Court reached a final judgment") *with, e.g.*, *GASH Assocs.* v. *Vill. of Rosemont*, 995 F.2d 726, 728 (CA7 1993) ("The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party?").

After parallel claims have been "actually litigated" in a state court, preclusion principles provide the appropriate basis for determining whether the federal action may proceed. *See* 28 U.S.C. §1738; *Matsushita*, 516 U.S., at 369; Beermann, *supra*, at 1231 ("[I]t is a fact of life in our system that two cases on the same occurrence may race to judgment, with preclusion rules barring the slower claim but only after the faster claim came to judgment."). The Court has made clear, in decisions both before and since *Feldman*, that 28 U.S.C. §1738 requires federal district courts to give a state-court judgment the same—not more and no less—preclusive effect that judgment would have under the preclusion law of the State in which it was rendered. *See Matsushita*, 516 U.S., at

369; *Parsons Steel,* 474 U.S., at 523; *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82-85 (1984); *Kremer*, 456 U.S., at 466; *Allen* v. *McCurry*, 449 U.S. 90, 96 (1980).

When it is appropriate to apply general preclusion principles, the relevant twofold inquiry is whether issues were or could have been actually litigated and whether the parties before the court that is being asked to apply the affirmative preclusion defense had a full and fair opportunity to litigate those issues. *See, e.g.*, *Garry* v. *Geils*, 82 F.3d 1362, 1367 n.8 (CA7 1996); *E.B.R. Corp.* v. *PSL Air Lease Corp.*, 313 A.2d 893, 894 (Del. 1973). When a court is applying res judicata law to issues that were actually litigated in a prior adjudication, there is no question that a party is attempting "to redetermine issues previously resolved." *Montana* v. *United States*, 440 U.S. 147, 154 (1979); *see Homola* v. *McNamara*, 59 F.3d 647, 650 (CA7 1995) ("A plaintiff who loses and tries again encounters the law of preclusion. The second complaint shows that the plaintiff wants to ignore rather than upset the judgment of the state tribunal.").

There was no dispute that ExxonMobil's claims against SABIC in the federal action are generally the same as the claims that were actually litigated to final judgment in ExxonMobil's favor—in the Delaware forum chosen by SABIC, *see, e.g.*, Pet. App. App. 86a. Applying Delaware preclusion law—as the district court would be required to do if the issue were properly before it, *see Matsushita*, 516 U.S., at 369; *Feldman*, 460 U.S., at 487-88—would likely preclude *SABIC* from maintaining a position inconsistent with the Delaware trial court's judgment against it. *See E.B.R. Corp.*, 313 A.2d, at 894 ("Under Delaware law a judgment in one cause of action is conclusive in a subsequent and different cause of action as to a question of fact actually litigated by the parties and determined in the first action."). Indeed, SABIC has expressly conceded the preclusive effect of the Delaware trial court's judgment against it on the merits of

ExxonMobil's claims. SABIC BIO 13; *see Montana*, 440 U.S., at 153 (noting that res judicata and collateral estoppel "preclude parties from *contesting* matters that they have had a full and fair opportunity to litigate" (emphasis added)). But the preclusive effect of the Delaware judgment was not properly before the court of appeals. SABIC appealed the district court's denial of its motion to dismiss on jurisdictional FSIA grounds under the narrow collateral-order exception to the prohibition on interlocutory appeals. Pet. App. 4a-5a. The court of appeals had no jurisdiction to consider preclusion issues that were never raised and never incorporated into a final judgment of the district court. *See Digital Equip. Corp.* v. *Desktop Direct*, 511 U.S. 863, 876 (1994) (citing *In re Corrugated Container Antitrust Litig.*, 694 F.2d 1041 (CA5 1983), for the proposition that a district court's rejection of a party's res judicata claim is not immediately appealable under the collateral-order exception).

By contrast, when *Rooker-Feldman* is invoked, the only relevant inquiry is whether the relief sought in the federal court would undo the state-court judgment—regardless whether the precise issues raised in the federal suit were actually litigated. *See Feldman*, 460 U.S., at 484 n.16 ("[T]he fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States district court should have jurisdiction over the claims."). Under *Feldman*, the relevant question is whether the relief sought by the federal plaintiff is actually challenging a prior adjudication. *See Feldman*, 460 U.S., at 483-84 (considering "[t]he difference between seeking review in a federal district court of a state court's final judgment in a bar admission matter and challenging the validity of a state bar admission rule"); *Noel*, 341 F.3d, at 1163 ("It is a forbidden de facto appeal under *Rooker-Feldman* when the plaintiff in federal district court complains of a legal wrong

allegedly committed by the state court, and seeks relief from the judgment of that court.").

The Third Circuit's injection of an actually-litigated inquiry into the analysis puts *Rooker-Feldman* into direct conflict with the Court's interpretation of §1738 by circumventing any consideration of state preclusion law. The Third Circuit's conclusion that *Rooker-Feldman*'s jurisdictional bar applies whenever identical claims have been actually litigated to final judgment in a state trial court necessarily forecloses any consideration of whether state preclusion principles would bar relitigation of those issues, replacing that consideration—apparently—with a federal common law of preclusion. *See* Pet. App. 7a (noting "a close affinity" between *Rooker-Feldman* and "the principles embodied in the legal concepts of claim and issue preclusion" but not acknowledging any obligation to refer to Delaware preclusion principles in deciding to dismiss this case); Friedman & Gaylord, *supra*, at 1139 & n.57; *cf. Migra*, 465 U.S., at 81 ("In the absence of federal law modifying the operation of §1738, the preclusive effect in federal court of [a] state-court judgment is determined by [state] law.").

Under the Third Circuit's approach, it is possible for a federal court applying *Rooker-Feldman* to give a state-court judgment greater preclusive effect than it would have under the law of the rendering State, especially in states in which a trial-court judgment that is pending on appeal does not have preclusive effect. *See, e.g.*, *People ex rel. Gow* v. *Mitchell Bros. Santa Ana Theater*, 161 Cal. Rptr. 562, 568 (Cal. Ct. App. 1980). Moreover, elevating preclusion principles to jurisdictional status gives them greater force than they properly enjoy. In contrast to a lack of subject matter jurisdiction, which can be raised at any time and can never be waived, res judicata is an affirmative defense that can be waived by a failure to raise it. *See* FED. R. CIV. P. 12(h)(3); *Arizona* v. *California*, 530 U.S. 392, 412 (2000) (noting that a

court's raising of a preclusion defense sua sponte "*might* be appropriate in *special circumstances*" (emphasis added)); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (explaining the inflexibility of jurisdiction and a court's obligation to raise the issue in all circumstances); *Garry* 82 F.3d, at 1365 ("Where *Rooker-Feldman* applies, lower federal courts have no power to address other affirmative defenses, including res judicata.").

As this case dramatically illustrates, elevating preclusion principles to jurisdictional status renders preclusion an offensive sword that a court can raise sua sponte with little justification other than as a docket-clearing measure. Indeed, by characterizing the inquiry as an application of *Rooker-Feldman*, the court of appeals applied preclusion principles against ExxonMobil despite SABIC's initial concession that *Rooker-Feldman* did not apply, *see* JA 24-25, and despite the fact that res judicata has never been raised in the district court and was not properly before the court of appeals in SABIC's interlocutory appeal brought on sovereign immunity grounds. *See Digital Equip. Corp.*, 511 U.S., at 876.

B. The Court of Appeals Preemptively Applied *Rooker-Feldman* Based on Speculation About the Pending Delaware Appeal.

After an ultimately superfluous excursion into whether identical claims were "actually litigated" or "inextricably intertwined," the court of appeals attempted to justify its preemptive application of *Rooker-Feldman* with the speculation that ExxonMobil might attempt, in the future, to contest an adverse judgment that the Delaware Supreme Court might or might not make in the pending appeal. But the fact that the federal-court claims were pending concurrently with the state-court claims before either case went to trial conclusively demonstrates that both sets of claims merely sought concurrent and independent relief from

SABIC's misconduct, not relief from a then nonexistent state-court judgment. The entry of a subsequent state-court judgment could not change the underlying nature of the federal claims and retroactively invoke *Rooker-Feldman*. The fact that the state-court judgment was favorable to ExxonMobil only further demonstrates the impossibility of applying *Rooker-Feldman* in these circumstances.

In the court of appeals, SABIC initially conceded that the *Rooker-Feldman* doctrine is inapposite to this case because ExxonMobil is not presently seeking review of any state-court judgment. *See* JA 24-25 (SABIC's counsel explaining, at oral argument, that this "case would not present directly a *Rooker-Feldman* problem in its current posture" and "Exxon/Mobil isn't asking [the federal district] court to review anything at this point. *If* it asks that court to do anything that reviews a judgment of the Delaware court, then *that* would be, in our view, what triggers the *Rooker-Feldman* problem." (emphasis added)). In its post-argument letter brief to the court of appeals, SABIC took a different tack. Although still acknowledging that "at this moment in time, ExxonMobil is not asking a federal court to review (and potentially reverse) the Delaware judgment," SABIC nevertheless urged the court of appeals to overlook the elemental fact that ExxonMobil's federal suit does not contest any state-court judgment, characterizing it as a "slight wrinkle" that "does not preclude immediate application of the *Rooker-Feldman* doctrine." JA 62.

But, far from being simply a "temporal wrinkle," *id.*, the fact that ExxonMobil is not asking the federal district court to review a state-court judgment entirely removes this case from the *Rooker-Feldman* realm. *See Johnson*, 512 U.S., at 1005-06 (explaining that under *Rooker-Feldman*, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state

judgment itself violates the loser's federal rights"); *GASH*, 995 F.2d, at 729 ("Because [plaintiff] complains about the judgment entered by a state court, the district court lacked jurisdiction."). *Rooker-Feldman* is inapposite when the federal plaintiff is not challenging the existing state-court decision, and speculation about what might happen to the state-court judgment on appeal only strengthens the conclusion that the federal claims, as they presently exist, do not challenge the state-court decision. *See Am. Reliable Ins. Co.*, 336 F.3d, at 320 (explaining that, for *Rooker-Feldman* to apply, "[i]t is sufficient that a state court *render a decision* resolving an issue that is the basis for the federal action" (emphasis added)). Indeed, expanding *Rooker-Feldman* to require dismissal of federal actions based on speculation about the possible outcome of a pending state proceeding creates a sweeping exception to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colo. River*, 424 U.S., at 817, that rends the very fabric of concurrent federal and state jurisdiction.

The court of appeals apparently accepted SABIC's assertion that "[i]f the *Rooker-Feldman* doctrine bars a lower federal court from exercising jurisdiction where the *effect* would be direct review of a state-court decision . . . , surely it bars ExxonMobil from maintaining a suit for the *sole and express purpose* of obtaining review of a state-court decision if and when that decision becomes adverse to ExxonMobil." JA 62; *see* Pet. App. 8a (opining that, if SABIC prevails in its Delaware appeal, "ExxonMobil's federal action would squarely be seeking to invalidate a final judgment of the state court, the very situation contemplated by *Rooker-Feldman*'s 'inextricably intertwined' bar"). But that syllogism is both a logical non sequitur and a question-begging, factually inaccurate characterization of this case. ExxonMobil has not sought—and never said it would seek—"review of a state-court decision." ExxonMobil's actions in each court system seek substantive redress for the injury caused by SABIC's

conduct; neither alleges injury caused by any state-court decision. *See Hutcherson*, 326 F.3d, at 755 ("If the injury alleged is distinct from that judgment, i.e., the party maintains an injury apart from the loss in state court and not 'inextricably intertwined' with the state judgment, . . . res judicata may apply, but *Rooker-Feldman* does not.") (citation omitted); *Noel*, 341 F.3d, at 1164-65 (stating that *Rooker-Feldman* applies only when "the injury of which [the federal plaintiff] complains was caused *by* the [state-court] judgment" itself rather than an out-of-court "injury that the state court failed to remedy"); *GASH*, 995 F.2d, at 729 (same); *see also* Beermann, *supra*, at 1214 ("[T]he *Rooker-Feldman* doctrine has no application when the complaint in federal court is about conduct outside of the state court, because it is inaccurate to characterize such a claim as an appeal from the state court's judgment.").

C. The Court of Appeals's Expansive Interpretation of *Rooker-Feldman* Destroys Traditional Concepts of Concurrent Jurisdiction.

"[S]imultaneous state and federal litigation of overlapping, and even identical, issues is an important feature of our federal system." *Noel*, 341 F.3d, at 1165 (citing *Parsons Steel*, 474 U.S., at 524-25; *Doran*, 422 U.S., at 928, and *Atl. Coast Line*, 398 U.S., at 295). The Court should reject the Third Circuit's application of the *Rooker-Feldman* doctrine because it destroys time-honored notions of concurrent state and federal jurisdiction. *See id.* (reversing a dismissal under *Feldman*'s "inextricably intertwined" test that was premised on the conclusion that the plaintiffs' "very similar, perhaps identical" claims "could have been raised in the parties' [pending state-court] litigation, or were already specifically addressed in that litigation"); *accord Vulcan Chem. Techs., Inc.* v. *Barker*, 297 F.3d 332, 338 n.2 (CA4 2002) ("It would be a novel application of the already beleaguered *Rooker-Feldman* doctrine to divest a federal court of subject matter

jurisdiction simply because a parallel case was later filed in State court seeking to decide the same question.").

The Third Circuit's reasoning that the presence of identical claims in pending federal and state proceedings necessarily means that the claims in the federal action will be "inextricably intertwined" with whatever judgment the state court eventually renders applies equally whether or not the claims have already been "actually litigated" in a state court. For example, in this case, the same rationale would have barred ExxonMobil's federal suit before the Delaware trial court rendered a judgment because it would permit the federal district court to rely on speculation that the trial-court judgment might be adverse to ExxonMobil and ExxonMobil might attempt to contest it in the federal court. If *Rooker-Feldman* could be properly applied to bar ExxonMobil's federal action because ExxonMobil might attempt to challenge a judgment the Delaware Supreme Court might make, there is no principled reason not to apply the jurisdictional bar to any suit in which a federal plaintiff might theoretically attempt to challenge a judgment that a state trial court might make on identical claims. That result cannot be squared with the well-established principle that "our dual system of federal and state governments allows parallel actions to proceed to judgment until one becomes preclusive of the other." *Vulcan*, 297 F.3d, at 340; *see Noel*, 341 F.3d, at 1165 ("We have never held that when there are simultaneous suits in state and federal court, in which related or 'inextricably intertwined' claims are being litigated, the federal suit must be dismissed under *Rooker-Feldman*.").

The Court has never suggested that *Rooker-Feldman* was intended to nullify the unique duality that characterizes the Nation's judicial system. *See Atl. Coast Line*, 398 U.S., at 295-96 (noting both that "lower federal courts possess no power whatever to sit in direct review of state court decisions" and that "the state and federal courts had concurrent

jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts"). Indeed, such a construction would tear the *Rooker-Feldman* doctrine from its roots as an articulation of the statutorily defined jurisdictional structure of the federal courts by divesting federal district courts of part of the original jurisdiction Congress has entrusted to them. *See* 28 U.S.C. §§1330, 1331, 1332, 1333; *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); *cf. Feldman*, 460 U.S., at 476 (citing 28 U.S.C. §1257 in support of *Rooker*'s jurisdictional rule); *Rooker*, 263 U.S., at 416 ("*Under the legislation of Congress*, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character." (emphasis added)). Nonjurisdictional protections appropriately address federalism and comity concerns that may arise in cases other than those in which the federal plaintiff is attempting a de facto appeal of a state-court decision previously made. *See Colo. River*, 424 U.S., at 814-18; *Noel*, 341 F.3d, at 1164 ("If there is simultaneously pending federal and state court litigation between the two parties dealing with the same or related issues, the federal district court in some circumstances may abstain or stay proceedings; or if there has been state court litigation that has already gone to judgment, the federal suit may be claim-precluded under [28 U.S.C.] § 1738.").[5]

"[It] was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Colo. River*, 424 U.S., at 813-14 (quoting *Ala. Pub. Serv. Comm'n* v. *S. Ry. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring)) (alteration in original). But, in appropriate cases, abstention

[5] It is worth noting that SABIC sought unsuccessfully to invoke *Colorado River* abstention. Pet. App. 67a-73a.

doctrines counsel—and sometimes require—a federal district court that has jurisdiction to stay its hand pending the outcome of ongoing state litigation. *See id.*, at 813-20. The Court has explained that abstention and prudential dismissals rest, respectively, on "considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts" and "on considerations of wise judicial administration." *Id.*, at 817 (internal quotation marks and brackets omitted). Applying the jurisdictional *Rooker-Feldman* doctrine while the relevant state proceeding is pending—as the Third Circuit has done in this case—replaces careful consideration of those factors with a blunt instrument that preemptively (and wrongly) assumes the federal suit will ineluctably transmute into a de facto appeal of the antici pated state decision. *Cf. Noel*, 341 F.3d, at 1160 ("These federalism-based abstention and comity doctrines are complex and subtle, ensuring that a decision by a federal court to proceed, abstain, or stay in the face of parallel state court litigation will be made only after considering a number of case- and doctrine-specific factors."); Susan Bandes, *The* Rooker-Feldman *Doctrine: Evaluating Its Jurisdictional Status*, 74 NOTRE DAME L. REV. 1175, 1186-87, 1204 (1999) (criticizing the lack of analysis that accompanies many dismissals under *Rooker-Feldman* because of the doctrine's status as a jurisdictional "trump card").

CONCLUSION

For these reasons, the Court should reverse the court of appeals's judgment and order ExxonMobil's claims to be reinstated.

Respectfully submitted,

ANDREW S. POLLIS
DAVID J. MICHALSKI
HAHN LOESER & PARKS LLP
3300 BP Tower
200 Public Square
Cleveland, Ohio 44114
(216) 621-0150

ELIZABETH J. SHER
PITNEY HARDIN LLP
200 Campus Drive
Florham Park, New Jersey 07932
(973) 966-6300

JAMES W. QUINN
DAVID LENDER
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-7000

GREGORY S. COLEMAN
Counsel of Record
CHRISTIAN J. WARD
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioners

JAN 4 - 2005

No. 03-1696

IN THE

Supreme Court of the United States

EXXONMOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC. AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,

Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF

KENNETH R. ADAMO
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

GREGORY A. CASTANIAS
(Counsel of Record)
LAWRENCE D. ROSENBERG
WILLIAM K. SHIREY II
JULIET JOHNSON KARASTELEV
ESTHER SLATER MCDONALD
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the court of appeals properly dismissed Petitioners' federal action pursuant to the *Rooker-Feldman* doctrine when: (i) the federal action presents claims identical tc ones already litigated to final judgment in the Delaware Superior Court; and (ii) Petitioners admit that the federal action is an "insurance policy" they will pursue only if they need to challenge a Delaware Supreme Court ruling reversing the Delaware Superior Court's final judgment for Petitioners.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner ExxonMobil Corporation has no parent corporations, and no publicly held corporation holds ten percent or more of its stock. Petitioner Exxon Chemical Arabia, Inc. is wholly owned by Exxon Overseas Corporation, which is wholly owned by ExxonMobil Corporation. Petitioner Mobil Yanbu Petrochemical Company, Inc. is wholly owned by Mobil Petroleum Company Inc., which is wholly owned by Mobil International Petrochemical Corporation, which is wholly owned by Mobil Corporation, which is wholly owned by ExxonMobil Corporation.

Respondent Saudi Basic Industries Corporation is a Saudi Arabian corporation that is owned seventy percent by the Saudi Arabian government and thirty percent by private investors. No publicly held corporation holds ten percent or more of its stock.

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BRIEF FOR RESPONDENT

Respondent Saudi Basic Industries Corporation ("SABIC") agrees generally with the statement of the legal rule advocated by Petitioners (collectively, "ExxonMobil"). The *Rooker-Feldman* doctrine bars federal actions that are *de facto* appeals of state-court judgments. But ExxonMobil's application of that rule to this case is strained and divorced from the federal jurisdictional statutes that define the *Rooker-Feldman* doctrine.

ExxonMobil's federal "insurance policy" suit is an impermissible *de facto* appeal because it is admittedly identical in every way to the Delaware suit that ExxonMobil already litigated to a final judgment. Any federal-court jurisdiction at this point would necessarily involve federal "review" of the state-court ruling, but the only federal court empowered to "review" state-court rulings is this Court. The judgment of the Third Circuit should be affirmed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-8a) was issued on March 24, 2004 and is reported at 364 F.3d 102.

The interlocutory order of the United States District Court for the District of New Jersey (Pet. App. 11a-77a) was issued on April 3, 2002. The opinion is reported at 194 F. Supp. 2d 378.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on March 24, 2004 (Pet. App. 1a-8a). The petition for writ of certiorari was filed on June 22, 2004, and granted on October 12, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES INVOLVED

The principal statutes at issue in this case, 28 U.S.C. §§ 1257, 1330, 1331, 1332, and 1738, are set forth in the Addendum to this Brief. (Add. 1a-2a.)

STATEMENT

This case centers on allegations that Respondent SABIC overcharged two SABIC-ExxonMobil joint ventures for certain technology used in the production of polyethylene. ExxonMobil's claims are all based on Saudi Arabian law, not federal law. ExxonMobil elected to go forward in a Delaware state-court action, rather than in this federal case, on the same claims against SABIC, and it won a $416.8 million final judgment against SABIC in the Delaware Superior Court. SABIC has appealed that judgment to the Delaware Supreme Court; briefing and oral argument are complete, and a decision is pending in that case.

The Third Circuit dismissed this federal action for lack of subject-matter jurisdiction pursuant to the *Rooker-Feldman* doctrine, because ExxonMobil admitted that its federal and Delaware suits raise "identical" claims, and that this federal suit is "an insurance policy" to be pursued only if the Delaware Supreme Court reverses the $416.8 million judgment. (Pet. App. 6a, 8a.) Indeed, ExxonMobil has said that, if SABIC is unsuccessful at obtaining a reversal in the Delaware state-court action, it will dismiss the federal suit. (Add. 3a-4a, 5a n.2.)

A. Background

In 1980, SABIC and two Delaware corporations – Mobil-Yanbu Corp. and Exxon Chemical Arabia, Inc. – formed two separate 50:50 joint ventures to produce polyethylene in Saudi Arabia. Both of those Delaware corporations are now wholly owned subsidiaries of ExxonMobil as a result of the

1999 merger between Exxon Corp. and Mobil Corp.[1] SABIC, which was then wholly owned, and is now 70% owned, by the Saudi Arabian government, entered into these joint ventures pursuant to a Saudi government mandate to attract capital investment and technological know-how from foreign corporations in the hope of better industrializing that nation.

The first of these two joint ventures – Yanpet – was formed on April 19, 1980 by a SABIC and Mobil-Yanbu joint-venture agreement. The other – Al-Jubail Petrochemical Co., known as Kemya – was formed on April 26, 1980 when SABIC and Exxon Chemical Arabia executed a nearly identical joint-venture agreement. Both Yanpet and Kemya are limited liability partnerships under Saudi Arabian law.

In 1998, SABIC brought unrelated claims of patent misappropriation against Exxon Corp. in federal district court in New Jersey. That complaint asserted direct claims by SABIC and derivative claims on behalf of Kemya, alleging that Exxon had breached a 1980 Service Agreement with Kemya by, in 1991, misappropriating technology belonging to the joint venture and using that technology to obtain two United States patents. SABIC invoked the district court's original jurisdiction under 28 U.S.C. § 1332 because the case involved non-federal claims against a diverse party. That case became known as "NJ-I."

In mid-2000, during discovery in the NJ-I case, ExxonMobil first alleged that SABIC had breached a provision of the joint-venture agreements. ExxonMobil

---

[1] On November 30, 1999, Exxon Corporation and Mobil Corporation merged to form ExxonMobil Corporation. Prior to that time, Exxon and Mobil were two entirely separate corporations, and SABIC's dealings with each company (and their respective subsidiaries) had been entirely separate.

claimed that, starting in 1980, SABIC provided certain technology for the production of polyethylene to the joint ventures and charged them a margin above SABIC's costs. ExxonMobil asserted that the joint-venture agreements required any technology provided by a partner to the joint ventures to be provided at cost.

B. The "Identical" Delaware And Federal Court Proceedings

On July 24, 2000, SABIC filed a declaratory-judgment action against the ExxonMobil subsidiaries in the Superior Court of New Castle County, Delaware. Because both ExxonMobil subsidiaries are Delaware corporations, Delaware was the only state where SABIC could ensure that it could obtain personal jurisdiction over both.

SABIC sought declarations that: (1) the relevant provisions of the joint-venture agreements do not apply to the polyethylene technology in question; (2) ExxonMobil's overcharge allegations are time-barred; and (3) SABIC had not overcharged the joint ventures. In early 2002, the ExxonMobil defendants asserted damage counterclaims for breach of contract and "usurpation" under Saudi Arabian law (called "*ghasb*") in the Delaware action.

On August 8, 2000, ExxonMobil and its two wholly owned subsidiaries filed this second case (called "NJ-II") in federal district court in New Jersey based upon the same dispute pending in Delaware. (Pet. 20; J.A. 3.) No federal law claims were asserted and jurisdiction was premised on 28 U.S.C. § 1330, which affords "original jurisdiction" in federal court for suits against foreign sovereigns and their commercial instrumentalities. ExxonMobil sought damages for SABIC's alleged breach of the joint-venture agreements.

SABIC immediately moved to dismiss ExxonMobil's federal suit based on, *inter alia*, SABIC's status as a foreign sovereign commercial instrumentality entitled to immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA"). (Pet. App. 45a-57a.) On

April 3, 2002, the district court, although recognizing that "it is undisputed that SABIC is a 'foreign state' as defined by the FSIA," held that SABIC's immunity had been abrogated based on the waiver exception, 28 U.S.C. § 1605(a)(1), and the commercial-activities exception, *id.* § 1605(a)(2), to immunity under the FSIA. (Pet. App. 45a-57a.) No litigation, including discovery, occurred in the NJ-II suit while the court's immunity decision was pending.

On April 22, 2002, SABIC filed an interlocutory appeal to the Third Circuit to challenge the district court's ruling denying SABIC immunity. (Pet. App. 4a.) The district court stayed proceedings pending resolution of that appeal.

Shortly before the New Jersey district court's ruling on the FSIA issue, ExxonMobil pushed to proceed to trial in the Delaware Superior Court. ExxonMobil's counsel urged:

> We are prepared to go forward. And, Your Honor, we're prepared to go forward quickly and have the case – if we're going to go and there's not going to be duplication, let's get the case moving and tried here in Delaware. And we have a schedule that we can propose today to get the case tried before the end of the year. It's our claim. It's our money. We'd like to go forward.

(Add. 8a.) The Delaware court agreed with ExxonMobil's election; the case proceeded rapidly through discovery; and a trial was held in March 2003.

ExxonMobil moved to be treated as the plaintiff in the Delaware action and thus to present its damage counterclaims first at trial. The Delaware court agreed, and after a two-week trial, a jury returned general verdicts on ExxonMobil's claims totaling $416.8 million. (Pet. App. 4a.) The Delaware Superior Court rejected SABIC's post-

trial motions, and the judgment became final in September 2003.[2]

On October 1, 2003, SABIC noticed its appeal to the Delaware Supreme Court. (Pet. App. 4a.) SABIC urged five primary arguments on appeal: (1) that ExxonMobil's claim was barred by limitations; (2) that ExxonMobil had released its claims against SABIC as part of a global release of claims its subsidiaries had against the joint ventures; (3) that Saudi contract law required judgment to be entered in SABIC's favor; (4) that Saudi law precluded ExxonMobil's "usurpation" tort claim; and (5) that the trial court had made critical evidentiary errors that compelled a new trial.

C. The Court Of Appeals' Proceedings And Disposition In This Action

On December 9, 2003, the Third Circuit heard argument in SABIC's interlocutory appeal.[3] Pursuant to the court's

[2] The Delaware Superior Court issued five separate orders with respect to SABIC's post-trial motions. *See SABIC v. Mobil Yanbu Petrochemical Co., Inc.*, No. 00C-07-161-JRJ, 2003 WL 22048238 (Del. Super. Sept. 2, 2003); *SABIC v. Mobil Yanbu Petrochemical Co., Inc.*, No. 00C-07-161-JRJ, 2003 WL 22048236 (Del. Super. Aug. 27, 2003); *SABIC v. Mobil Yanbu Petrochemical Co. Inc.*, No. Civ.A. 00C-07-161-JRJ, 2003 WL 22016813 (Del. Super. Aug. 26, 2003); *SABIC v. Mobil Yanbu Petrochemical Co. Inc.*, No. Civ.A. 00C-07-161-JRJ, 2003 WL 22016864 (Del. Super. Aug. 26, 2003); *SABIC v. Mobil Yanbu Petrochemical Co. Inc.*, No. Civ.A. 00C-07-161-JRJ, 2003 WL 22016843 (Del. Super. Aug. 26, 2003).

[3] Concurrently with the filing of its response brief at the court of appeals in July 2003, ExxonMobil moved for a stay of the appeal. In doing so, ExxonMobil argued that "if SABIC is unsuccessful on appeal in Delaware, the judgment in the Related Delaware Case – finding that SABIC overcharged the Joint Ventures – would be res judicata, rendering *moot* ExxonMobil's claims in NJ-II and, of course, SABIC's interlocutory appeal." (Add. 4a (emphasis added).) SABIC opposed the stay, but a two-judge panel initially granted it. The stay was subsequently lifted by the three-judge merits panel.

order, issued the day before argument (J.A. 17), the parties specifically addressed the question whether the Delaware final judgment stripped the federal court of jurisdiction under the *Rooker-Feldman* doctrine. During argument, the court expressly asked ExxonMobil's counsel, Mr. Quinn, to explain their continued pursuit of the federal action:

> THE COURT: But I guess you're not too unhappy so far in Delaware?
>
> MR. QUINN: So far so good. So far so good, but knock on wood, you never know, because anything could happen. We feel pretty good about it, but –
>
> THE COURT: So New Jersey is an insurance policy.
>
> MR. QUINN: In a way it is. . . .

(J.A. 35.)

ExxonMobil's counsel also admitted that, if SABIC loses the Delaware appeal, "there really would be nothing left to do except dismiss the New Jersey case" because ExxonMobil "can only collect the $417 million once." (J.A. 34-35.)

On March 24, 2004, after receiving supplemental briefing from both parties, the Third Circuit vacated the district court's decision and remanded the case "with instructions to dismiss th[e] action for lack of subject matter jurisdiction" pursuant to the *Rooker-Feldman* doctrine. (Pet. App. 8a.) The Third Circuit explained that "'a claim is barred by *Rooker-Feldman* under two circumstances: first, if the claim was 'actually litigated' in state court prior to filing of the federal action or, second, if the claim is 'inextricably intertwined with [the] state adjudication.'" (*Id.*, 5a (citations omitted).) The court held:

> Because ExxonMobil's federal claims were identical to the claims in which the Delaware Superior Court reached a final judgment, they are barred by the *Rooker-Feldman* doctrine. Even within our Court's narrow confines for *Rooker-Feldman*, this case is easily cabined. We cannot

> imagine a more classic invocation of the *Rooker-Feldman* jurisdictional bar than to preclude a party from maintaining a federal action as an "insurance policy" in case the state trial court decision in that party's favor is overturned by an appellate state court.

(Pet. App. 8a.)

ExxonMobil did not seek rehearing or rehearing en banc. Instead, ExxonMobil filed a petition for certiorari on June 22, 2004, which this Court granted on October 12, 2004.

SUMMARY OF ARGUMENT

I. This case should be dismissed as moot because ExxonMobil has already obtained complete relief on the "identical" claims in a judgment from the Delaware Superior Court, and because this federal action admittedly serves no purpose except as an "insurance policy" in the event that the Delaware Supreme Court reverses that judgment. A case is moot where, as here, full relief has been accorded by another court; even ExxonMobil admits that it "can only collect the $417 million once." A case is also moot where it does not present a live case or controversy; that is the circumstance here because the Delaware judgment fully extinguished ExxonMobil's claims.

II. If there remains anything for the federal court to do in this case, then it must be barred by the *Rooker-Feldman* doctrine, which recognizes that the only federal court that can "review" state-court judgments is this Court, 28 U.S.C. § 1257, and that any action that amounts to appellate "review" of a state-court judgment, in sum or in substance, is inconsistent with the strictly original jurisdiction bestowed on the federal district courts by Congress. The lower federal courts possess only the jurisdiction expressly granted by Congress, and Congress plainly denied the lower federal courts any manner of appellate authority over state-court judgments.

What has come to be called "the *Rooker-Feldman* doctrine" effectuates this congressional scheme by barring all lower federal-court "review" of state-court judgments. This Court's precedents make clear that federal suits challenging errors that occurred in the course of the state-court proceedings, as well as federal suits that seek to relitigate the "same claims" litigated in the state court, are barred. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989). The doctrine thus serves the important interests of comity and cooperation that underlie this statutory scheme by preventing the lower federal courts from "review[ing]" the work of the co-equal state courts, and by barring dissatisfied state-court litigants from jumping ship and relitigating their claims in federal court.

Whatever limits the doctrine may have, *Rooker-Feldman* unquestionably bars relitigation of "the very same" state-court claims in federal court – as ExxonMobil seeks here. *ASARCO*, 490 U.S. at 622. Such suits necessarily operate as *de facto* appeals, requiring the federal district court to reexamine – issue-by-issue – the same claims undergirding the state-court judgment. Such appellate review would thwart Congress's sound conclusion, and the lessons of history, that only this constitutionally mandated Court has the dignity and authority to make federal-court review of state-court decisions palatable.

By barring federal relitigation of "the very same" claims already adjudicated in a state court, the *Rooker-Feldman* doctrine uniquely fulfills a critical role in our system of judicial federalism. *First*, it complements our system of concurrent jurisdiction: Concurrent jurisdiction is designed to allow dual litigation of identical claims, but *not* beyond the point that the first court reaches a final judgment. *Second*, the doctrine forecloses federal relitigation where state-law preclusion principles would not, such as where a state appellate court vacates a final judgment and orders a

new trial; thus, the doctrine operates to prevent any federal-court interference in the state-court appellate process. *Third*, it protects the institutional relationship of the state and federal courts by ensuring that the federal court does not engage in any manner of "review," regardless of the particular relief the federal plaintiff seeks. *Finally*, unlike abstention and prudential dismissal doctrines, the *Rooker-Feldman* doctrine is properly not left to the "discretion" of the district courts, because it is premised on Congress's express limitations on federal jurisdiction.

By ExxonMobil's own admission, the only relief it could ever hope to achieve in federal court would be to trump the final outcome achieved by the Delaware state courts. There is no sound reason (and ExxonMobil offers none) why federal courts should provide such "insurance policies" for state-court plaintiffs worried that they may ultimately not prevail in the state-court judicial process that they themselves elected to pursue. Congress certainly did not give the lower federal courts that power.

ARGUMENT

This case is now moot because the claims on which this suit are based have been extinguished, and ExxonMobil has already admittedly received all the relief it can obtain. But even if there might be something left for a federal court to do in this case, this suit is jurisdictionally barred by the *Rooker-Feldman* doctrine because it is a *de facto* appeal that would require a federal district court to review the Delaware court's judgment on the "identical" claims.

I. THIS CASE IS NOW MOOT

No live case or controversy is currently before this Court because the Delaware Superior Court has adjudicated the precise claims at issue and granted ExxonMobil the complete relief it sought on those claims. Article III of the U.S. Constitution requires that, "[t]o be cognizable in a federal court, a suit '. . . must be a real and substantial controversy admitting of specific relief . . . .'" *North Carolina v. Rice*,

404 U.S. 244, 246 (1971) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). It is hornbook law that federal courts may not exercise jurisdiction in cases where they can provide no remedy.[4]

Where "full relief is accorded by another tribunal," such as a state court, then "a proceeding seeking the same relief is moot." 13A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.2, at 241 (2d ed. 1984). *See also Washington Mkt. Co. v. District of Columbia*, 137 U.S. 62, 63 (1890); *cf. Patterson v. Warner*, 415 U.S. 303 (1974) (remanding case to district court for a determination on mootness in light of intervening decision of Supreme Court of West Virginia). This is true even when the judgment is issued by a lower state court. *See Alton v. Alton*, 347 U.S. 610, 611 (1954) (dismissing federal action "upon the ground that the cause is moot" in light of intervening Connecticut superior court decree).

Here, ExxonMobil has already received complete relief. In the words of its lawyer, "we can only collect the $417 million once." (J.A. 34.) Indeed, ExxonMobil acknowledged that the Delaware state-court case would cause this federal action to become moot. In its Motion to Stay the Third Circuit appeal, ExxonMobil urged:

> if SABIC is unsuccessful on appeal in Delaware, the judgment in the Related Delaware Case – finding that SABIC overcharged the Joint Ventures – would be res judicata, rendering *moot* ExxonMobil's claims in NJ-II and, of course, SABIC's interlocutory appeal.

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[4] *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5, at 127 (3d ed. 1999) (case is moot if "a federal court decision is not likely to have any effect"); LINDA MULLENIX, MARTIN REDISH & GEORGENE VAIRO, UNDERSTANDING FEDERAL COURTS AND JURISDICTION § 2.08 (1998) ("When two proceedings are pending simultaneously and each involves the same issues and parties, then, a binding decision in one court will moot those issues in the second court.").

(Add. 4a) (emphasis added).) But Delaware Superior Court decisions, like the one here, are considered final judgments for purposes of preclusion. *Ezzes v. Ackerman*, 234 A.2d 444, 445 (Del. 1967). Indeed, it is well settled that "a valid and final judgment rendered in an action *extinguishes* the plaintiff's claim pursuant to the rules of merger." RESTATEMENT (SECOND) OF JUDGMENTS § 24 (emphasis added); *see also Hughes v. Trans World Airlines*, 336 A.2d 572, 574 (Del. 1975) (following the Restatement's rule of "bar," the corollary to "merger"); *Horsey v. Dozier*, No. 702 CIV. A. 1969, 1970 WL 115846, at *2 (Del. Super. Ct. Oct. 5, 1970) (quoting RESTATEMENT, *supra*, § 24). ExxonMobil's federal-court claims are already moot, then, notwithstanding the pending state appeal.[5]

Almost identical circumstances led to a mootness holding in *Friedman's, Inc. v. Dunlap*, 290 F.3d 191 (4th Cir. 2002). There, Friedman's obtained an order compelling arbitration from a lower state court in West Virginia, and subsequently sought the same relief in federal court. The court of appeals observed that appellant was "hedging its bets . . . want[ing] a federal order compelling arbitration at the ready in case the West Virginia Supreme Court of Appeals . . . reverses the decision of the lower state court." *Id.* at 195. In addition to finding the *Rooker-Feldman* bar applicable, the Fourth Circuit held that the case was moot because "when a state

[5] *See, e.g., N. Natural Gas Co. v. Grounds*, 931 F.2d 678, 684-85 (10th Cir. 1991) (holding that federal appeal was made "moot by operation of the doctrine of res judicata" because an intervening final state-court decision meant that the "controversy has already ended"); *W. Group Nurseries, Inc. v. Ergas*, 167 F.3d 1354, 1358 (11th Cir. 1999) (deciding whether appeal was rendered moot by the operation of res judicata); *see also Nesglo, Inc. v. Chase Manhattan Bank*, 562 F. Supp. 1029, 1046 (D.P.R. 1983) (analyzing whether a state-court judgment had preclusive effect on identical claims presented to the federal court, finding that it did, and subsequently holding that the case was moot because "collateral judicial proceedings have fully disposed of the live case").

court orders the same relief sought by the plaintiff in a parallel federal action, there is no longer a live controversy and the parallel federal claim is moot." *Id.* at 197.

In light of the complete damages award ExxonMobil received in Delaware state court on the identical claims, a federal judgment could accomplish nothing at this point. Accordingly, "[a]ny judgment of [this Court] . . . 'would be wholly ineffectual for want of a subject matter on which it could operate.'" *Local No. 8-6 Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 371 (1960) (citation omitted).

II. IF THIS CASE IS NOT MOOT, THEN EXXONMOBIL'S SUIT IS NECESSARILY SEEKING TO REVIEW THE DELAWARE JUDGMENT AND IS BARRED BY *ROOKER-FELDMAN*

The *Rooker-Feldman* doctrine bars federal suits that are expressly or functionally appeals of state-court judgments. ExxonMobil's federal suit, which raises the "identical" claims already litigated to judgment in Delaware state court, is therefore an impermissible *de facto* appeal. Notwithstanding ExxonMobil's desire to maintain this suit as an "insurance policy," the court of appeals correctly dismissed it under *Rooker-Feldman* for want of federal subject-matter jurisdiction.

A. Federal District Courts Lack Jurisdiction Over Cases That Require "Review" Of A State-Court Judgment

The jurisdictional statutes on which the *Rooker-Feldman* doctrine is built bar federal district courts from entertaining suits that raise claims or issues already adjudicated in a state-court proceeding. In this way, the doctrine carries out the explicit congressional design behind our dual court system: This Court is the only federal court that may review a state-court judgment, and the lower federal courts should not interfere with or impede the independent operation of state

trial and appellate courts by reviewing their judgments, in sum or in substance.

1. The *Rooker-Feldman* Doctrine Is Compelled By The Statutes That Define The Limited Scope Of Federal Jurisdiction

Under the federal jurisdictional system tailored by Congress, federal district courts are given "original jurisdiction" over certain matters, *see, e.g.*, 28 U.S.C. §§ 1330, 1331, 1332 *et seq.*; and the federal courts of appeals have jurisdiction to review certain decisions and judgments of federal district courts and federal agencies (but not state courts). *See, e.g.*, 28 U.S.C. §§ 1291, 1292 *et seq.* This Court is the *only* federal court with any jurisdiction to "review" a decision of any state court (with the exception of habeas corpus cases, *see* 28 U.S.C. § 2254). *See* 28 U.S.C. § 1257. This specifically described jurisdictional regime defines the scope and application of what has become known as the *Rooker-Feldman* doctrine. *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002) (noting that the doctrine "recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court, *see* [28 U.S.C.] § 1257(a)."). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 594 (3d ed. 2000).

Two fundamental interpretive principles inform the doctrine. One is the rule that federal courts can *only* exercise authority expressly granted them by Congress. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Finley v. United States*, 490 U.S. 545, 547-48 (1989) ("It remains rudimentary law" that in order for lower federal courts to exercise jurisdiction "[t]he Constitution must have given [it] . . . and an act of Congress must have supplied it. To the extent that such an action is not taken, the power lies dormant.") (internal quotation marks omitted).

The other is the rule that this Court "will not attribute to Congress an intent to intrude on state governmental functions," *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). One of those core state functions is the orderly operation of a state judiciary, including the administration of state appellate courts to review the judgments of state trial courts. *See, e.g.*, Del. Const. art. iv, § 11; *see generally Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970) (the federal Constitution "reserved" to the States the power to maintain "state judicial systems for the decision of legal controversies"); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their jurisdiction to the precise limits which the statute has defined.").

These statutes and principles define the *Rooker-Feldman* doctrine. Section 1257 grants this Court power to "review" "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had," and then only in limited circumstances where a federal issue is present. Congress's vesting of that appellate review power in this Court alone excludes the possibility that *any other* federal court can "review" judgments of state courts.

By contrast, Sections 1330, 1331, 1332 and the other related jurisdictional provisions grant the district courts only "original jurisdiction" over certain categories of civil actions.[6] Congress gave the federal district courts no "review" power over any state-court decisions; indeed, the very notion of "original jurisdiction" is antithetical to the

[6] Federal district courts do have narrow appellate jurisdiction over certain rulings of Article I judicial officers. They "have jurisdiction to hear appeals" from certain orders of bankruptcy courts, 28 U.S.C. § 158(a), and to "make a de novo determination" of the report and recommendations of a United States Magistrate Judge, *see* 28 U.S.C. § 636(b)(1).

power to engage in appellate "review."[7] *See Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 820 (1824) ("In those cases in which original jurisdiction is given . . . the judicial power of the United States cannot be exercised in its appellate form."). Thus, the only natural conclusion that can be drawn from this statutory scheme is that Congress by design denied the lower federal courts any manner of authority to review state-court judgments. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) ("The jurisdiction possessed by the District Courts is strictly original.").

"[T]he closest we ha[ve] come to cross-system appellate review" lies in the federal habeas corpus statutes, but even there, "habeas corpus jurisdiction does not entail direct review of a state or local authority's decision." *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 179 (1997) (Ginsburg, J., joined by Stevens, J., dissenting) (emphasis omitted). This sole and precisely limited statutory authority, 28 U.S.C. § 2254(a), confirms that Congress has, as a general matter, denied the federal district courts any "review" authority over state-court judgments. That Congress has not otherwise afforded district courts such authority makes plain that the district courts do not possess it.[8]

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[7] Federal bankruptcy courts do have limited original jurisdiction to "avoid state judgments, *see, e.g.*, 11 U.S.C. §§ 544, 547, 548, 549; to modify them, *see, e.g.*, 11 U.S.C. §§ 1129, 1325; and to discharge them, *see, e.g.*, 11 U.S.C. §§ 727, 1141, 1328." *In re Gruntz*, 202 F.3d 1074, 1079 (9th Cir. 2000) (*en banc*).

[8] This was not always the case. Although the Judiciary Act of 1789 first established the principle that federal trial courts should not review state-court decisions, *see, e.g.*, An Act To Establish the Judicial Courts of the United States, ch. 20, §§ 9, 11, 1 Stat. 73, 76-77, 78 (1789), Congress strayed from this course once, during the height of the Civil War. The Act of March 3, 1863, ch. 81, 12 Stat. 755-58, which was most notable for authorizing the President to "suspend the privilege of the writ of habeas corpus" "whenever, in his judgment, the public safety may require it" (*id.* § 1, 12 Stat. at 755), also allowed for removal of a limited category of state cases (involving actions against officers and others involving torts for arrests and imprisonment) *after judgment*, for a federal trial *de novo*, "as if the same [suit] had been there originally commenced, the judgment [of the state court] in such case notwithstanding." *Id.* § 5, 12 Stat. at 756-57. The Court struck down Section 5 on Seventh Amendment grounds, *see The Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1869), consistent with its then-existing precedent that the Seventh Amendment prohibited reexamination of facts tried by a jury in state court, *id.* at 280-81 & n.9.

Thus, what has come to be known as the *Rooker-Feldman* doctrine is a statutory imperative: The lower federal courts are without any jurisdiction to "review" state-court judgments.

2. This Court's Decisions Confirm That *Rooker-Feldman* Effectuates The Congressional Scheme Of Limited Federal-Court Jurisdiction

This Court has applied these principles in three critical decisions: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); and *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989).

Rooker confirms what Section 1257 plainly says: Only this Court (and not the lower federal courts) may review state-court judgments, and even then only where (1) an issue is presented and actually litigated with respect to "the validity of a statute of [a] State . . . on the ground of its being repugnant to the Constitution," or (2) an issue is presented concerning a "right, privilege, or immunity . . . under the Constitution."[9] 28 U.S.C. § 1257.

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[9] *Rooker* addressed Section 237 of the Judicial Code, the predecessor to present Section 1257. Section 237 was identical to Section 1257, except that it provided for review "by writ of error" (rather than by writ of certiorari) where a state's highest court found (1) a treaty or statute of the United States *invalid*, or (2) a state statute *valid* under the Constitution or

The dispute in *Rooker* – which involved a suit filed by the Rookers alleging that the Fidelity Trust Company had breached a trust agreement – started in Indiana state court. After two trials and two rounds of appeals to the Indiana Supreme Court, the Rookers lost. They then raised two constitutional challenges in a petition for rehearing to the Indiana Supreme Court; they argued that an Indiana statute "relating to conclusions stated in pleadings and the mode of securing better statements" was unconstitutional, *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 116-17 (1923), and "that on the second appeal the [Indiana Supreme Court] took and applied a view of the trust agreement different from that taken and announced on the first appeal, and that this change in decision impaired the obligation of the agreement," and thus violated the Contract Clause. *Id.* at 117-18. The state supreme court denied the rehearing petition and the Rookers brought a writ of error before this Court, which this Court dismissed. *Id.* at 118.

The Rookers then filed suit in federal district court raising the two identical constitutional challenges that had already been raised to the Indiana Supreme Court and this Court, and seeking an order declaring the state judgment "null and void." *Rooker*, 263 U.S. at 414. The district court subsequently dismissed the suit for lack of jurisdiction and the Rookers appealed directly to this Court. *Id.* at 415. Finding that "the suit is so plainly not within the District Court's jurisdiction as defined by Congress," this Court affirmed the dismissal, stating:

> If the constitutional questions stated in the [district court action] actually arose in the [state case], it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of

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laws of the United States. Act of September 6, 1916, ch. 448, § 2, 39 Stat. 726, 726-27 (emphases added).

> jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Id. at 415-16 (citations omitted).

In *District of Columbia Court of Appeals v. Feldman*, this Court elaborated on *Rooker* and held that constitutional or federal law claims involving the state-court proceedings may still be barred even if they were not specifically litigated in the state court. It is enough, the *Feldman* Court reasoned, that the federal claims are "inextricably intertwined" with the state court's judgment such that they would in essence require the federal court "to review the state-court decision." 460 U.S. at 483 n.16. Like the Rookers' second complaint, Feldman's district court complaint involved a claim challenging "the validity of a statute of [a] State . . . on the ground of its being repugnant to the Constitution," and (2) a claim concerning a "right, privilege, or immunity . . . under the Constitution." *See* 28 U.S.C. § 1257.

In *Feldman*, a D.C. bar applicant brought suit in federal district court after the District of Columbia Court of Appeals denied his petition for entrance to the bar. 460 U.S. at 468. The Court of Appeals subsequently refused to waive a bar admissions rule requiring applicants to have graduated from an accredited law school. *Id.* at 464-65. Feldman then brought suit in federal district court alleging two constitutional violations: that the District of Columbia Court of Appeals acted arbitrarily in violation of due process in refusing to waive the admission rule, and that the rule itself

was unconstitutional. *Id.* at 486. Unlike the situation in *Rooker*, neither of these claims was "actually litigated" in the D.C. court system on the applicant's petition for admission to the bar.

This Court held that Feldman's claim that the D.C. court acted arbitrarily in denying him a waiver was jurisdictionally barred. *Id.* at 482-83. Although that specific claim was not actually litigated in the D.C. court, this Court found that it was "inextricably intertwined" with the D.C. court's judgment denying bar admission,[10] and so the district court was "in essence being called upon to review the state-court decision." *Id.* at 483 n.16. The Court reasoned that the federal suit required "review" of the D.C. court's decision and, therefore, Feldman "should have sought review [of the judgment] . . . in this Court." *Feldman*, 460 U.S. at 482. However, the *Feldman* Court did allow the general constitutional challenge to the bar admission rule, which had not been presented to the D.C. Court of Appeals, because that claim was neither actually litigated as part of the dispute, nor was inextricably intertwined with the D.C. court's ruling. *Id.* at 487. Notably, this Court "expressly [did] not reach the question of whether the doctrine of *res judicata* forecloses" the federal district court from considering the general constitutional challenge. *Id.* at 487-88.

The third principal case addressing the scope of *Rooker-Feldman* is *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989). *ASARCO* demonstrates that readjudication of the "very same issues that were determined in the state-court proceedings" would be a violation of "*Rooker-Feldman*'s construction of 28 U.S.C. § 1257." *Id.* at 622-23. *ASARCO* concerned an

[10] *See also Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring) ("the federal claim is inextricably intertwined with the state-court judgment" "[w]here federal relief can only be predicated upon a conviction that the state court was wrong").

appeal to this Court of a state judgment addressing "the validity of a statute of [Arizona]" that was "drawn in question on the ground of its being repugnant to the . . . laws of the United States." 28 U.S.C. § 1257.

In *ASARCO*, various individual taxpayers and the Arizona Education Association brought suit in Arizona state court against the Arizona Land Department and others. 490 U.S. at 610. The plaintiffs sought a declaration that a state statute governing mineral leases on state lands was void because it did not conform with the federal laws that originally granted those lands from the United States to Arizona. *Id.* The lessees of the disputed mineral rights were permitted to intervene as defendants. While the trial court upheld the state statute, the Arizona Supreme Court reversed, holding the statute "unconstitutional and invalid." *Id.* A number of the mineral lessees then filed a petition for certiorari, which this Court granted. *Id.*

The *ASARCO* Court first considered whether it possessed jurisdiction to review the state-court decision, "since neither respondent taxpayers nor respondent teachers association, who were the original plaintiffs, would have satisfied the requirements for bringing suit in federal court at the outset." *Id.* at 612. Although concluding that there was "no basis on which to find that respondents would satisfy the requirements for federal standing," *id.* at 616-17, this Court nonetheless held that "[t]he state proceedings ended in a declaratory judgment adverse to petitioners, an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts." *Id.* at 618.

In reaching this conclusion, this Court expressly rejected the United States' argument "that the proper course for petitioners is to sue in federal trial court in order to readjudicate the very same issues that were determined in the state-court proceedings." *Id.* at 622. This Court reasoned that doing so "would come at the cost of much disrespect to state-court proceedings" because, "in essence, [it] would be

an attempt to obtain direct review of the Arizona Supreme Court's decision in the lower federal courts, and would represent a partial inroad on *Rooker-Feldman*'s construction of 28 U.S.C. § 1257." *Id.* at 622-23.

Critically, this Court recognized that, because the constitutionality of the Arizona statute had already been "actually litigated" and otherwise was a proper basis for appeal of a federal issue under Section 1257, it was outside the "original jurisdiction" afforded the federal district courts. *See id.* And this was recognized simply because the federal suit would have raised "these same claims" already adjudicated, *id.* at 620; the federal suit did not need to seek expressly to have the district court reverse the Arizona Supreme Court's decision, *see id.*

Taken together, *Rooker*, *Feldman*, and *ASARCO* demonstrate two fundamental aspects of the doctrine. *First*, it is a jurisdiction-allocating device ensuring that this Court's exclusive appellate authority under Section 1257 is not circumvented, directly or indirectly, by proceedings in the lower federal courts. If an issue or claim raised in a federal district court complaint is one that would in effect require review of a state-court judgment, then it is a prohibited *de facto* appeal and outside the original jurisdiction of the district courts.

Second, this Court's appellate authority generally involves one or both of two categories of issues arising from a state-court judgment: (i) grievances with or challenges to the state-court proceedings themselves that were either "actually litigated" or are "inextricably intertwined" with the judgment, and (ii) claims that were "actually litigated" involving the parties' underlying dispute.[11] *See also, e.g.*,

[11] *Amici Curiae* Defenders of Property Rights *et al.* "urge this Court to . . . construe the *Rooker-Feldman* doctrine so that it does not apply or does not divest federal courts of jurisdiction to hear takings claims ripened under the [*Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)] state court exhaustion requirement." (Amici Br. 12.) In *Williamson County*, this Court held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 473 U.S. at 195.

Affirming the Third Circuit here will not bar takings claims under Section 1983 from federal court. So long as the federal plaintiff litigates only his *state-law claims* in state court, and not his Just Compensation claim, a federal action will not be barred by *Rooker-Feldman*, since the federal plaintiff will not be seeking to relitigate an identical claim. Critically, *Williamson* did not hold that a Just Compensation claim must first be litigated in state court, but only that the constitutional claim was not ripe until the state courts had finally denied "just compensation" under state law using adequate procedures. *Williamson*, 473 U.S. at 196-97. Moreover, the federal plaintiff may preserve his Just Compensation claim through an *England* reservation, *see England v. Louisiana Bd. of Med. Exam'rs*, 375 U.S. 411, 417 (1964). *See generally* J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209, 244-51 (2003). The *England* reservation allows a federal plaintiff to preserve his right to litigate his Section 1983 claims in federal court *if* the plaintiff does not litigate his federal claims in state court *and* expressly reserves his right to litigate the Section 1983 claims in federal court. *See Ivy Club v. Edwards*, 943 F.2d 270, 280 (3d Cir. 1991).

Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 18 (1987) (Scalia, J., joined by O'Connor, J., concurring). Either of these sorts of challenges, in essence, requires "review" of the state-court judgment. *See* Section II(D)(5), *infra*. Whenever a party wishes to proceed in federal court with one of these two categories of issues, direct review by this Court under Section 1257 is the only recourse.

3. *Rooker-Feldman*'s Bar On "Identical" Claims Already Adjudicated Is Consistent With Judicial Federalism

This understanding of the doctrine carries out the congressionally limited jurisdiction of the federal courts and the concomitant reasons behind those statutes: to prevent needless friction between state and federal courts. *See Kowalski v. Tesmer*, 543 U.S. __, __, 2004 WL 2847751, at *5 (Dec. 13, 2004) ("[F]ederal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999))). In this way, "the *Rooker-Feldman* doctrine is first and foremost an integral part of judicial federalism." Suzanna Sherry, *Judicial Federalism in the Trenches: The* Rooker-Feldman *Doctrine In Action*, 74 NOTRE DAME L. REV. 1085, 1101 (1999).

History confirms this understanding. While Congress could consitutionally allow lower federal courts to review state-court decisions, no Congress (save the unsuccessful 1863 attempt noted at n.8 above) has ever allowed the lower federal courts to serve "as appellate tribunals with jurisdiction to review state court decisions on federal questions." Preble Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CAL. L. REV. 943, 946 (1976). *See also* THE FEDERALIST NO. 82 (A. Hamilton). As this Court has repeatedly emphasized, "from the beginning we have had in this country two essentially separate legal systems." *Atl. Coast Line R.R.*, 398 U.S. at 286 ("Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system.").

"The Supreme Court [alone] was chosen to review state court judgments because only it had sufficient dignity to make federal review of state courts reasonably palatable."

David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 323 (1978). In fact, our Nation's early history was rife with challenges by the states to having their courts' decisions reviewed even by *this* Court. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (rebuffing the Virginia Court of Appeals' attempt to remove its decisions from review by the U.S. Supreme Court). This kind of objection from state courts has been echoed in the modern era. *See, e.g., Pope v. Turner*, 517 P.2d 536, 537 (Utah 1973) (remarking, in a habeas corpus case, that "we are given the satisfaction of knowing that that which we do in this matter is of no consequence whatsoever and that the ruling of the Supreme Court of a sovereign state of the Union is subject to the whim of the inferior district courts in the Federal system"). In view of this historical context, it would be improper for *lower* federal courts, in any fashion other than by the clearest direction of Congress, to impede or otherwise reconsider final state-court decisions. *See generally* Williamson B.C. Chang, *Rediscovering the* Rooker *Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L. J. 1337, 1345 (1980) (stating that it would be "patently unexplainable" to expand the lower federal courts' jurisdiction to allow for review of state-court judgments).

Furthermore, the doctrine also protects the state appellate processes. Under *Rooker-Feldman*, when a dispute has reached a final judgment in state court (whether favorable or unfavorable), then all subsequent litigation must be pursued through the state appellate system – not anew in federal district court. *See, e.g., Crutchfield v. Countrywide Home Loans*, 389 F.3d 1144, 1147 (10th Cir. 2004) (*Rooker-Feldman* "confin[es] state cases to state appellate systems" and, thus, "respects the values of federalism implicit in our parallel system of independent state and federal courts, with the United States Supreme Court at the apex of both"). *See generally Atl. Coast Line R.R.*, 398 U.S. at 287 ("Proceedings in state courts should normally be allowed to

continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."); Sherry, *supra*, 74 NOTRE DAME L. REV. at 1100-01 (noting that "*Rooker-Feldman* is about courts," and that "allowing a civil litigant a second bite at the trial court apple is inconsistent with the statutory scheme that seems to contemplate the Supreme Court as the only federal court permitted to review state court civil decisions").

The doctrine serves the same interests in federalism and comity that underlie the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283. That provision governs the reverse situation as *Rooker-Feldman* – where a state court seeks to relitigate a federal case that has gone to judgment. The "relitigation exception" thus allows federal courts to enjoin state-court proceedings that seek to proceed with claims already adjudicated in federal court. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 144 (1988). In enacting the "relitigation exception," Congress expressly recognized that our system of dual sovereignty could not function if co-equal courts were permitted to pass upon the identical claims already litigated in the other forum. *Atl. Coast Line R.R.*, 398 U.S. at 286 ("[T]his dual system could not function if state and federal courts were free to fight each other for control of a particular case."). The *Rooker-Feldman* doctrine is thus a direct congressional limitation on federal jurisdiction that serves the same interests in judicial federalism as the "relitigation exception" to the Anti-Injunction Act. *See* Sherry, *supra*, 74 NOTRE DAME L. REV. at 1105.[12]

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[12] Of course, Congress had to give the federal courts this limited injunctive power to accomplish this goal in the Anti-Injunction Act, because it does not possess the same constitutional authority to define state-court jurisdiction as it has to define that of the federal courts. At most, Congress might limit the state courts' authority to consider federal

So, too, this Court's habeas corpus decisions lend further support for the proposition that it is a *de facto* appeal for a federal court to engage in readjudication of issues "actually litigated" in state-court proceedings. To avoid the state-court exhaustion requirements of habeas corpus law, state prisoners often seek to frame challenges to their convictions and sentences as damages actions under 42 U.S.C. § 1983. This Court in *Heck v. Humphrey* adopted a broad functional standard to determine whether a Section 1983 proceeding is an impermissible *de facto* attempt to obtain federal review of a state conviction or sentence. 512 U.S. 477, 486-87 (1994). If a successful Section 1983 action would "necessarily demonstrate[]" the invalidity of a state-court judgment, it is a *de facto* challenge to the state-court conviction or sentence and thus can only be brought in habeas. *Id.* at 481-82.

In *Heck*, this Court itself recognized the close relationship between attempts to obtain collateral federal "review" of state criminal and civil judgments – indeed, it cited *Rooker* in support of the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction," and this Court's "long expressed . . . concern[] for finality and consistency" and resulting unwillingness "to expand opportunities for collateral attack." *Heck*, 512 U.S. at 484-85. *See also Duckworth v. Eagan*, 492 U.S. 195, 211 (1989) (O'Connor, J., joined by Scalia, J., concurring) (noting that habeas review by lower federal courts "has always been a flashpoint of tension in the delicate relationship of the federal and state courts and this exercise of federal power should not be undertaken lightly

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issues. *See Tarble's Case*, 80 U.S. 397, 407 (1871); *see also Johnson v. Fankell*, 520 U.S. 911, 922 n.13 (1997); *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Fay v. Noia*, 372 U.S. 391, 466-67 (1963) (Harlan, J., dissenting); THE FEDERALIST NO. 82 (A. Hamilton) ("[T]he state courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.").

where no significant federal values are at stake"). These concerns apply with even greater force to federal-court reexamination of identical claims in the civil context, as there is no statutory authority for any sort of "civil habeas corpus" jurisdiction.

In short, the *Rooker-Feldman* doctrine prevents disappointed litigants from abandoning the state-court processes and pursuing the same claims in federal court if adverse circumstances develop in either the state trial or appellate courts. In this way, even critics of the doctrine recognize that it fulfills the "state interest in protecting the value of work done by its courts, as well as an interest in stopping parties from toying with state courts by filing suits and then dismissing them if things do not go as they wish." Barry Friedman & James E. Gaylord, Rooker-Feldman, *From the Ground Up*, 74 NOTRE DAME L. REV. 1129, 1155-56 (1999).

B. An "Identical" Federal Suit On The "Identical" Claims Already Adjudicated In State Court Impermissibly Requires Federal Appellate Review Of The State-Court Judgment

Whatever limits there are to the *Rooker-Feldman* doctrine, there is no doubt that a federal suit seeking to relitigate "the very same" claims for identical relief already embodied in a state-court judgment on the merits operates as an impermissible *de facto* appeal – particularly where, as here, the claims do not raise any federal questions.[13]

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[13] In cases where the rule of decision comes strictly from state law (or, as in the Delaware case, foreign law), *de facto* federal-court review of state-court judgments would perversely allow litigants to obtain federal review that even this Court could not provide under 28 U.S.C. § 1257. Moreover, such a regime could yield the bizarre result of allowing federal review of state-law determinations that this Court has long held that state courts are institutionally better equipped to answer. *See, e.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393-98 (1988).

This Court recognized this very principle in *ASARCO*, where it noted that federal court relitigation of the "same claims" raised in state court would require the "federal trial court . . . to readjudicate the very same issues that were determined in the state-court proceedings." 490 U.S. at 620, 622. Even though this "readjucat[ion of] the very same issues" would not have expressly taken the form of an appeal (in that the federal plaintiffs would not have been expressly noticing an "appeal" requesting review of the state-court judgment, or seeking a federal-court judgment "reversing" or "vacating" the state-court judgment), this Court still recognized that it would, "in essence," be a "review in the lower federal courts of a decision reached by the highest state court." *Id.* at 622.

Such full-scale "relitigation" in federal district court is even more offensive to federalism and comity than the situations presented in *Rooker* and *Feldman* themselves. Those cases involved attempts to relitigate discrete constitutional issues "actually litigated" in the state courts or "inextricably intertwined" with the state-court judgment. By contrast, a complete "do-over" in federal court of claims already decided in state court is tantamount to *de novo* review of every legal and factual conclusion reached by the state courts. *See* Susan Bandes, *The* Rooker-Feldman *Doctrine: Evaluating Its Jurisdictional Status*, 74 NOTRE DAME L. REV. 1175, 1179 (1999) (criticizing the doctrine but noting that it should apply where "litigants ask the federal courts to rehear issues identical to those on which they have already obtained state court decisions").

A federal court's issue-by-issue "relitigation" of the identical claims, in essence *de novo* appellate review, would result in a judgment carrying much the same force and effect

as an appellate decision reversing or affirming. Even putting aside the chaos and conflict that would result from a federal judgment at odds with the state-court judgment, the fact remains that mere "review" of the state judgment – regardless of whether the federal court agrees or disagrees with the state court – would be a profound insult to the state court's dignity, scarcely different than if the federal district court purported to issue an order "reversing" or "vacating" the state court's judgment. *See, e.g., In re Gruntz*, 202 F.3d 1074, 1078 n.2 (9th Cir. 2002) (*en banc*); Currie, *supra*, 45 U. CHI. L. REV. at 323.

Finally, from the perspective of the district court, the simple fact is that the court will still be called upon to address the identical issues – irrespective of whether the prevailing party in state court also brought the federal suit. *See, e.g., Friedman's, Inc.*, 290 F.3d at 197.[14] Although the federal plaintiff will be advancing the same arguments that the state court accepted, the defendant will necessarily challenge each of those arguments in the course of defending the federal action, just as it did in the state court. And as the federal court works through these interlocutory disputes and ultimately arrives at a final decision, the proceeding will take the shape of a *de facto* appeal because the district court will, in essence, be reviewing the work already done that led to the state court's judgment.

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[14] *See also Bosdorf v. Beach*, 79 F. Supp. 2d 1337, 1341 (S.D. Fla. 1999) (dismissing federal suit even though plaintiffs "have not directly challenged the state court's ruling or asked this court to direct the state court to do something . . . [because] the principles behind *Rooker-Feldman* prevent the Court from hearing [plaintiffs'] claims"; reasoning that "the spirit of the doctrine is to prevent federal courts from interfering with state court rulings," and the doctrine itself "reflects the important respect and understanding that goes to the very heart of federalism – the dual dignity of state and federal courts").

C. ExxonMobil's "Identical" Federal Suit Here Is Barred Under *Rooker-Feldman*

ExxonMobil's suit here is identical, and admittedly so, to the Delaware state action in which the state trial court rendered a substantial money judgment in favor of ExxonMobil. Because the identical claims raised in this suit have been "actually litigated" in the state court, the Third Circuit properly concluded that this suit presents a "classic invocation of the *Rooker-Feldman* jurisdictional bar." (Pet. App. 8a.)

ExxonMobil concedes that the claims in this suit are identical to those already litigated to judgment in Delaware. In its petition for certiorari, ExxonMobil admitted that there has already been a "prior adjudication of identical claims in the Delaware trial court" (Pet. 20), that "ExxonMobil's claims based on SABIC's overcharging of the joint ventures are identical in the federal and Delaware actions" (*id.*, 18), and that the claims here are "identical to claims in an action pending on appeal in the Delaware Supreme Court" (*id.*, 2). *See, e.g., Friedman's, Inc.*, 290 F.3d at 196 ("[T]he fact that the decision of a state court is winding its way through the state appellate system does not subject it to federal review in the meantime."); *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 199 (4th Cir. 2000) (same). Moreover, there is no question that ExxonMobil received full relief on its claims, having recovered every cent of the $416.8 million it sought. As ExxonMobil acknowledged in oral argument before the Third Circuit, ExxonMobil is simply litigating this suit as an "insurance policy" in the event that things go south for it in the Delaware Supreme Court. (J.A. 35.)

Because ExxonMobil admits that it has "actually litigated" the identical claims to final judgment in Delaware state court, any and all further litigation about those claims is about "review" of state-court rulings, which is the province of the Delaware Supreme Court and, eventually, this Court (assuming the existence of a constitutional or federal issue) –

but not a federal district court. Relitigation of these "identical" claims in federal district court would impermissibly require the district court to pass upon – "review," in the words of Section 1257 – the Delaware courts' work in this extraordinary case. And paradoxically, that federal-court review would likely be more potent than the review available from this Court under Section 1257, for ExxonMobil's complaints asserted no federal claims.

In this case, once the Delaware trial court had reached a judgment for ExxonMobil, relitigation in federal court was prohibited. This is so regardless of any possible future outcome in the Delaware Supreme Court, because when that court rules, its ruling will itself be embodied in a second state-court judgment, this time an appellate judgment. If that court affirms, defense against any relitigation of these claims would require a challenge to the Delaware Supreme Court's judgment. If that court reverses on the merits, ExxonMobil's prosecution of the identical claims in federal court would challenge the Delaware Supreme Court's judgment. And, even if the Delaware Supreme Court were to remand the claims for a new trial, or to reverse on a procedural ground, relitigation of those claims in federal court would still require federal "review" of the numerous legal and factual determinations by the Delaware Superior Court and Supreme Court underlying those courts' judgments.

Simply put, once the Delaware trial court entered final judgment on these "identical" claims, the Delaware courts became the only avenue for continued litigation, short of Supreme Court review under Section 1257 (in the event a constitutional or federal law issue exists). Accordingly, the court of appeals correctly recognized that the federal suit is now outside the original jurisdiction of the district court, and it correctly dismissed this suit without prejudice.

D. ExxonMobil's Contrary Arguments Are Without Merit

ExxonMobil characterizes *Rooker-Feldman* as a "jurisdictional principle that the subject matter jurisdiction bestowed by Congress on the lower federal courts does not include jurisdiction to review state-court decisions." (Pet. Br. 8.) SABIC has no problem with that articulation of the rule, as far as it goes. But it does not go far at all: ExxonMobil offers numerous arguments regarding the *application* of this rule that are inconsistent with its own articulation of the rule, ignore the text of the relevant jurisdictional statutes, misconstrue other doctrines related to federal jurisdiction, and rely upon inapposite policy contentions.

1. Dual Sovereignty And Concurrent Jurisdiction Do Not Allow For Lower Federal-Court Review Of State-Court Decisions

ExxonMobil contends that if *Rooker-Feldman* barred federal suits seeking to relitigate "identical" claims from a state court proceeding, then this "would eviscerate concurrent jurisdiction." (Pet. Br. 10; *see also id.*, 28.) This erroneous assertion rests on two critical misunderstandings.

First, ExxonMobil incorrectly asserts that concurrent state and federal jurisdiction over identical claims extends past the entry of a final judgment by one of the competing fora. (*See* Pet. Br. 29-30.) State and federal courts may simultaneously have original jurisdiction over identical claims. *Growe v. Emison*, 507 U.S. 25, 32 (1993); *see also McClellan v. Carland*, 217 U.S. 268, 282 (1910). This, of course, makes perfect sense, because otherwise a party unhappy with the federal forum could file a defensive action in state court and thereby deprive the federal court of jurisdiction; since the state and federal trial courts are co-equal, neither would be required to defer to the on-going work of the other. *See* CHEMERINSKY, *supra*, § 14.2; 1 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 335, at 672 (1925).

Where one forum arrives at a final judgment, however, the other relinquishes original jurisdiction over the "identical" claims, because whatever follows – in whatever court – is "review" of that final judgment. Indeed, this Court has never held that a federal district court can continue to exercise concurrent jurisdiction over claims "actually litigated" to a judgment in state court. Continued litigation of the identical claims would put the court that is still proceeding in the position of effectively reviewing the earlier court's judgment. *Martin v. Wilks*, 490 U.S. 755, 784 n.21 (1989) (Stevens, J., dissenting) ("permitting collateral attacks also leads to the anomaly that courts will, on occasion, be required to sit in review of judgments entered by other courts of equal – or even greater – authority") (citing *Rooker*, *Feldman*, and *ASARCO*).

But under ExxonMobil's application of the doctrine, concurrent jurisdiction would have allowed the state and federal suits to proceed virtually simultaneously, reach *opposite* judgments, and then continue up their respective state and federal appellate chains. This, in turn, would yield the unseemly (to say the least) possibility that the Delaware Supreme Court and the Third Circuit would continue in a race to appellate judgment, in the desire to be the first court to pronounce on ExxonMobil's right to recovery under the Saudi Arabian legal principles at issue. While preclusion doctrines *might* avoid this result, there are too many vagaries to those doctrines to *ensure* against this. *See* Section II(D)(2), below. The proper application of the jurisdictional *Rooker-Feldman* doctrine, however, draws a hard line that avoids this cross-system tension, and ensures that the Delaware courts, with which ExxonMobil chose to cast its lot, are allowed to complete their work free of federal second-guessing. *See, e.g.*, Friedman & Gaylord, *supra*, 74 NOTRE DAME L. REV. at 1174 ("Federal courts ought to be reluctant to provide a forum for ship-jumping by state plaintiffs; state law may not accommodate this interest

because it results from the interjurisdictional problem arising from the existence of federal courts.").

Second, ExxonMobil argues that concurrent jurisdiction would be eliminated if a federal district court could not relitigate claims "actually litigated," because, in their estimation, this "version of *Rooker-Feldman* compels dismissal of a federal plaintiff's claims whenever identical claims are also pending in state court." (Pet. Br. 10; *see also* Pet. Br. 29.) But *Rooker-Feldman* does not compel dismissal of federal claims identical to those merely "pending" in state court; only when the identical claims are actually litigated to judgment is the suit exclusively committed to the state judicial system.

ExxonMobil's reliance on the notion of concurrent federal-state jurisdiction as a reason to rule in its favor would, as the Third Circuit recognized, only promote circumvention of the state-court appellate processes and improperly place federal courts in the statutorily forbidden role of reviewing state-court judgments. (Pet. App. 7a.) Moreover, it would encourage forum-shopping, forum-jumping, and never-ending litigation. Those results are neither desirable nor allowed by statute.

2. *Rooker-Feldman* And Res Judicata Are Not "Co-Extensive" And Serve Different Purposes

ExxonMobil erroneously argues that *Rooker-Feldman*'s bar on identical claims that have been actually litigated in state court "conflate[s] *Rooker-Feldman* with res judicata" (Pet. Br. 10), and thereby makes the doctrine "redundant with preclusion." (Pet. Br. 18.) This assertion is both incorrect and irrelevant.

First, barring federal-court relitigation of the identical claims in ExxonMobil's federal suit would not "conflate" *Rooker-Feldman* and res judicata. *Parkview Assocs. P'ship v. City of Lebanon*, 225 F.3d 321, 329 (3d Cir. 2000) ("'Equating the *Rooker-Feldman* doctrine with preclusion is natural; both sets of principles define the respect one court

owes to an earlier judgment. But the two are not coextensive.'"). "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been raised in that action.*" *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis added); *Div. of Child Support Enforcement ex rel. Blake v. Myrks*, 606 A.2d 748, 750 (Del. 1992) ("[T]he procedural 'bar of *res judicata* extends to all issues which might have been raised and decided in the first suit as well as to all issues that actually were decided.'"). *Rooker-Feldman*, in contrast, only bars federal suits that seek, in sum or substance, appellate review of claims actually litigated to judgment in the state-court system, and challenges to the judicial proceedings themselves.[15] *Rooker-Feldman*, unlike res judicata, does not bar claims that merely "could have been raised" but were not.

Feldman itself makes this clear. This Court found that the challenge to the District of Columbia Court of Appeals' decision should have been raised as a direct appeal to the Supreme Court. 460 U.S. at 486. However, the general challenge to the underlying bar admission rule, which had not been raised before the D.C. court, was not jurisdictionally barred, although this Court remanded the issue to the district court to determine if it was precluded by res judicata. *Id.* at 487-88. *See also Parkview Assocs. P'ship*, 225 F.3d at 327; *Ritter v. Ross*, 992 F.2d 750, 754 (7th Cir. 1993).

Second, *Rooker-Feldman* has applications in situations where res judicata would not apply. For example, a

[15] To the extent that there is an overlap between *Rooker-Feldman* and res judicata, "overlap" is not in and of itself impermissible. Even ExxonMobil concedes this. (Pet. Br. 18 ("There is, in fact, almost certainly overlap – that is, some actions that are jurisdictionally barred by *Rooker-Feldman* would also be barred by preclusion doctrine, if jurisdiction existed in the federal court to apply preclusion.").)

substantial minority of states (including California) do not apply res judicata until the states' highest court has rendered a final decision (where an appeal is taken).[16] In such instances, *Rooker-Feldman* would properly bar federal-court relitigation of the identical issues even before the state's highest court had ruled. This is particularly important because, in addition to preventing the federal district court from considering a *de facto* appeal of the state-court judgment, *Rooker-Feldman*'s bar simultaneously prevents the dissatisfied state-court litigant from seeking to relitigate the claims in federal court in the hopes of achieving a preclusive favorable judgment before the state appellate process is exhausted. This is exactly why, "once the federal

[16] Some of the states that do not attach preclusive effect to a judgment until the highest state court has rendered a final decision (or the time to take an appeal to the highest court has expired), include California (*Sandoval v. Superior Ct. of Kings County*, 190 Cal. Rptr. 29, 32 (Ct. App. 1983)); Georgia (*Lexington Developers, Inc. v. O'Neal Constr. Co.*, 238 S.E.2d 770, 771 (Ga. Ct. App. 1977)); Hawaii (*Flores v. Barretto*, 54 P.3d 441, 450 (Haw. 2002) (Moon, C.J., dissenting)); Idaho (*Rincover v. State*, 917 P.2d 1293, 1298 (Idaho 1996)); Kansas (*Grimmett v. S & W Auto Sales*, 988 P.2d 755, 757 (Kan. Ct. App. 1999)); Louisiana (*Dupre v. Floyd*, 825 So.2d 1238, 1240 (La. Ct. App. 2002)); Nevada (*Sherman v. Dilley*, 3 Nev. 21, 1867 WL 2012, at *4 (1867)); New Hampshire (*In re Donovan*, 623 A.2d 1322, 1324 (N.H. 1993)); Oklahoma (*Grider v. USX Corp.*, 847 P.2d 779, 784 n.1 (Okla. 1993)); South Dakota (*Poindexter v. Hand County Bd. of Equalization*, 565 N.W.2d 86, 90 (S.D. 1997)); Tennessee (*McBurney v. Aldrich*, 816 S.W.2d 30, 34 (Tenn. Ct. App. 1991)); Utah (*Young v. Hansen*, 218 P.2d 674, 675 (Utah 1950)); Vermont (*Berisha v. Hardy*, 474 A.2d 90, 91 (Vt. 1984)); Virginia (*Faison v. Hudson*, 417 S.E.2d 302, 305 (Va. 1992)); and West Virginia (*Jordache Enter., Inc. v. Nat'l Union Fire Ins. Co.*, 513 S.E.2d 692, 703 (W. Va. 1998)). *See generally* E.H. Schopler, Annotation, *Judgment as Res Judicata Pending Appeal or Motion for a New Trial, or During the Time Allowed Therefor*, 9 A.L.R.2d 984, 1950 WL 7140 (1950 & Supp. 1997). Similarly, the Commonwealth of Puerto Rico does not attach a preclusive effect until the Island's highest court has ruled. *See, e.g., Cruz v. Melecio*, 204 F.3d 14, 20-21 (1st Cir. 2000).

plaintiff opts voluntarily to submit all claims to the state courts, that ought to bar a subsequent federal suit on *Rooker-Feldman* grounds even if preclusion does not apply." Friedman & Gaylord, *supra*, 74 NOTRE DAME L. REV. at 1161.

Third, *Rooker-Feldman* properly bars *federal-court* relitigation of claims where exceptions exist in state preclusion law that allow for *state-court* relitigation. For example, California recognizes an exception to res judicata for matters of significant public interest (such as election-related disputes). *See Bates v. Jones*, 131 F.3d 843, 845 (9th Cir. 1997) (*en banc*). Relitigation in the federal courts, however, represents a direct affront to the judicial federalism embodied in the federal jurisdictional statutes: While state-court relitigation will, in the end, produce but one final binding state-court decision, relitigation in federal court produces competing decisions between the state and federal courts. As Judge Rymer (joined by Judge O'Scannlain) has put it, in such instances "*Rooker-Feldman* instructs that a federal district court lacks jurisdiction to start down this path." *Id.* at 856 (Rymer, J., concurring); *see also id.* ("[T]o re-review the constitutionality of Proposition 140 put the district court on a collision course with the California Supreme Court. . . . Appellate authority would be turned upside down if the federal district court were able effectively to 'overrule' the California Supreme Court.").

Fourth, *Rooker-Feldman* is not subject to waiver for failure to timely raise the bar, as res judicata may be. As a principle of federal subject-matter jurisdiction, *Rooker-Feldman* may – indeed, must – be considered by the Court *sua sponte*, but res judicata is an affirmative defense under most states' laws and, therefore, may be subject to waiver if not timely raised. *See, e.g., Garry v. Geils*, 82 F.3d 1362, 1367 n.8 (7th Cir. 1996). But the federalism and forum-allocation interests behind the jurisdictional statutes would not be furthered by making their application dependent on

the parties' litigation choices. *See* Currie, *supra*, 45 U. CHI. L. REV. at 324-25.

Res judicata is a doctrine focused primarily on the parties and on finality. It "precludes the parties or their privies from relitigating issues," and is designed to "relieve parties of the cost and vexation of multiple lawsuits" that might produce "inconsistent decisions." *Allen v. McCurry*, 449 U.S. at 94. By contrast, *Rooker-Feldman*, as a jurisdictional principle, is court- and federalism-focused, playing the critical institutional role of preventing needless friction within our system of judicial federalism.[17] *See generally Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("no action of the parties can confer subject-matter jurisdiction upon a federal court"; thus, "the consent of the parties is irrelevant," "principles of estoppel do not apply," "and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings").

Fifth, res judicata only applies so long as a final judgment is in effect, *see Tyson Foods, Inc. v. Aetos Corp.*, 818 A.2d 145, 147-48 (Del. 2003) (discussing the general rule that vacatur may be necessary to prevent a judgment from obtaining precedential or preclusive res judicata effect), while *Rooker-Feldman* continues to apply from the time the state trial-court proceedings are first completed and the state appellate process becomes available – even if a state appellate court, as part of its own judgment, alters the trial court's ruling or orders a new trial.

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[17] *See, e.g., Lemonds v. St. Louis County*, 222 F.3d 488, 495 (8th Cir. 2000) ("[W]hereas res judicata is largely a matter of common law and involves the impropriety of permitting parties to have 'two bites at the apple,' *Rooker-Feldman* is based squarely on federal law and is concerned with federalism . . . ."); *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 479 (10th Cir. 2002) (same).

This is demonstrated by considering the differing application of the two doctrines where a state-court final judgment, after winding its way through the state's appellate process, is vacated and a new trial is ordered. In such an instance, there would be no res judicata bar to an identical federal suit and so the non-prevailing state party would, in the absence of *Rooker-Feldman*, be free to pursue federal litigation in order to escape the state appellate court's conclusions (which would obviously be the law of the case on retrial in the state trial court). Yet the federal court would still be asked to "review" state-court rulings – both the appellate court's judgment and the trial court's prior judgment. That is perhaps even more of an affront to the dignity of the state courts, and to the "[c]ooperation and comity" expected of the respective state and federal court systems, than federal-court review of a state trial-court judgment. *Ruhrgas AG*, 526 U.S. at 586.

Sixth and finally, *Rooker-Feldman* as properly understood does not conflict with 28 U.S.C. § 1738, the Full Faith and Credit Act (*see* Pet. Br. 21), nor does it "circumvent[] consideration of state preclusion law, in contravention of [the] congressional mandate" under Section 1738, as ExxonMobil claims. (Pet. Br. 10.) ExxonMobil has the inquiry backwards – application of Section 1738, which is a merits inquiry, *see, e.g., United States ex rel. Laird v. Lockheed Martin Eng'g & Science Servs. Co.*, 336 F.3d 346, 350 (5th Cir. 2003), first requires that the district court have jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause."). None of the cases cited by ExxonMobil suggests that a federal court's jurisdiction should be determined by reference to state preclusion law. *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375-79 (1996); *Johnson v. De Grandy*, 512 U.S. 997, 1005 (1994).

3. The Application Of *Rooker-Feldman* Does Not Turn On Whether The Federal Plaintiff Is Seeking Relief From the State-Court Judgment

ExxonMobil erroneously contends that the *Rooker-Feldman* bar has no application here because ExxonMobil is not seeking "relief" from the state-court judgment (Pet. Br. 21), since "the state-court judgment was favorable to ExxonMobil." (*Id.*, 26.) ExxonMobil then argues that by invoking *Rooker-Feldman* now, the Third Circuit engaged in "speculation" that SABIC would prevail in the pending appeal to the Delaware Supreme Court such that this suit would then take the form of a request for relief by ExxonMobil. (*Id.*, 27.)

This argument only confirms that this case is now moot. *See* Section I, *supra*. But even if it could be said that a case or controversy remained, it was hardly "speculation" on the Third Circuit's part that led to this holding. Rather, it was ExxonMobil's own assertion of what it seeks to use this suit to accomplish that informed the Third Circuit's decision. Put most starkly, if ExxonMobil were allowed to make a claim on its "insurance policy," that, too, would constitute impermissible federal-court review of the state proceedings.

In arguing otherwise, ExxonMobil takes an unduly restrictive view of what constitutes a *de facto* appeal, looking only to the subjective intention of the federal plaintiff and ignoring that the federal-court action would in effect require review of the state-court judgment. As ExxonMobil views it, "the real question at the core of a *Rooker-Feldman* inquiry [is] . . . whether the *relief* sought by ExxonMobil in its federal suit is the nullification of a state-court decision previously made." (Pet. Br. 21 (emphasis in original); *see also id.*, 20 (a *de facto* appeal requires that the "federal plaintiff[]" must have an "intention to nullify a state judgment"); *id.*, 23 ("[T]he relevant question is whether the relief sought by the federal plaintiff is *actually* challenging a prior adjudication.") (emphasis added); *id.*, 27 ("*Rooker-*

Feldman is inapposite when the federal plaintiff is not challenging the existing state-court decision").)

But contrary to ExxonMobil's contention, "the core of a *Rooker-Feldman* inquiry" (*id.*, 21) is neither the federal plaintiff's subjective "intention[s]" nor "the relief sought by the federal-court plaintiff." (*Id.*, 20.) The proper focus is on the courts, not the parties: The federal statutes prohibit "review" of state-court judgments, not merely "relief" from those judgments (indeed, most appeals in the federal system do not result in "relief" for the appellant, but all involve "review" of the lower-court decision). Even if the federal court were to arrive at the same conclusion as the state court, that determination (in effect an appellate "affirmance") would still be the product of impermissible federal-court review. But the critical point remains that a federal district court will be no less engaged in *de facto* appellate review simply because the federal plaintiff is pursuing the same result on identical claims that have already been litigated. Artful pleading in the *ad damnum* clause of a federal-court complaint cannot and should not be the tipping point for ascertaining federal jurisdiction. *See Feldman*, 460 U.S. at 482 ("[t]he form of the proceedings is not significant. It is the nature and effect which is controlling.") (quoting *In re Summers*, 325 U.S. 561, 567 (1945)); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) ("It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings.").

4. Discretionary Abstention Doctrines Cannot Serve As A Substitute For *Rooker-Feldman*

ExxonMobil erroneously argues that *Rooker-Feldman* should not apply to bar litigation of identical claims "actually litigated," but that instead "abstention and prudential dismissals" should be utilized by federal district courts. (Pet. Br. 31.) In ExxonMobil's estimation, the discretionary nature of abstention and prudential dismissals "appropriately

address [the] federalism and comity concerns" raised by federal-court relitigation. (*Id.*, 30.) This argument is flawed for a number of reasons.

First, *Rooker-Feldman* is a jurisdictional doctrine grounded in congressional mandate. By contrast, abstention and prudential dismissals are purely judicial creations that are applied to bar or delay suits in situations where Congress has nonetheless afforded jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (discussing the doctrine of abstention as an "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy" of which it has jurisdiction). To the extent that abstention doctrines involve discretionary "consideration" or balancing of multiple factors (Pet. Br. 31), it is because abstention otherwise goes against congressionally mandated jurisdiction, and so must only be invoked after "a careful balancing of the important factors . . . with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983). *Rooker-Feldman*, which is jurisdictional and compelled by statute, does not require or deserve a multi-factor analysis, balancing, or discretion before it can be applied.

Second, ExxonMobil ignores this Court's repeated admonition that district courts should only exercise discretion to abstain in "exceptional circumstances." *Moses H. Cone*, 460 U.S. at 25-26; *see also, e.g., County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) (abstention remains "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it"). Even though federal district courts and state trial courts are co-equal in our dual judicial systems, ExxonMobil would empower federal district courts with discretion to decide on their own whether to reexamine "identical claims" that had already been "actually litigated."

But ExxonMobil offers no explanation why trial-court discretion would more "appropriately address federalism and comity concerns," and the fact is that Congress has already balanced those considerations and drawn a firm jurisdictional line that prevents *de facto* appeals such as ExxonMobil's federal suit here.

5. ExxonMobil Wrongly Advocates The Seventh And Ninth Circuits' Restrictive Approaches

In its petition (*see* Pet. 21-23), and in its opening brief (Pet. Br. 28), ExxonMobil erroneously argues that this Court should adopt the extraordinarily restrictive view of *Rooker-Feldman* followed by the Seventh and Ninth Circuits. *See, e.g., Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003); *GASH Assocs. v. Vill. of Rosemont*, 995 F.2d 726 (7th Cir. 1993).

Although the Seventh and Ninth Circuits' approaches differ somewhat, under either approach *Rooker-Feldman* would only bar a federal suit where that suit seeks to redress injuries caused by the state court, but would not apply where the suit specifically seeks to redress injuries caused by the opposing parties (*i.e.*, where the federal plaintiff advances the same underlying claims "actually litigated" in state court).[18] (*See* Pet. 16 (citing *GASH Assocs.*, 995 F.2d at 728); *see also* Pet. Br. 28 ("*Rooker-Feldman* applies only

[18] *Jensen v. Foley*, 295 F.3d 745, 747-48 (7th Cir. 2002) ("The *Rooker-Feldman* doctrine, generally speaking, bars a plaintiff from bringing a § 1983 suit to remedy an injury *inflicted by* the state court's decision. . . . Preclusion, on the other hand, applies when a federal plaintiff complains of an injury that was not caused by the state court, but which the state court has previously failed to rectify."); *Garry v. Geils*, 82 F.3d 1362, 1366-67 (7th Cir. 1996) ("[T]he distinction between a federal claim alleging injury caused by a state court judgment (necessarily raising the *Rooker-Feldman* doctrine) and a federal claim alleging a prior injury that a state court failed to remedy (raising a potential res judicata problem but not *Rooker-Feldman*) has been recognized in this circuit at least since our decision in *GASH*.") (footnote omitted).

when 'the injury of which [the federal plaintiff] complains was caused *by* the [state court] judgment' itself rather than an out-of-court 'injury that the state court failed to remedy'" (quoting *Noel*, 341 F.3d at 1164-65)) (changes in original).)

Even then, the Ninth Circuit would only apply the *Rooker-Feldman* bar where the federal plaintiff goes further and "seeks as her remedy relief from the state court judgment." *See, e.g., Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004) ("If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction."). As noted above, neither the drafting of the request for relief nor the federal plaintiff's subjective intentions should be the touchstone for application of *Rooker-Feldman*. Indeed, under the Ninth Circuit's hyper-restrictive approach, a federal plaintiff could bring a declaratory-judgment action expressly challenging a state-court judgment – just so long as the federal plaintiff was savvy enough not to go further in the prayer for relief and actually seek "relief from [the] state court judgment." Yet, surely a declaratory judgment in the federal plaintiff's favor would be just as offensive to the congressionally created scheme of judicial federalism than a federal-court order attempting expressly to vacate the state-court judgment.

Indeed, the Ninth Circuit's version of *Rooker-Feldman* appears to be limited to the rare (perhaps nonexistent) case where a federal litigant actually seeks the remedy of reversal or vacatur in his federal complaint – a remedy that federal trial courts are powerless to give, *see* 28 U.S.C. § 2106. That rule would improperly depend on artful pleading and a litigant's subjective intentions, and in turn would invite vexatious litigants of all stripes into the federal courts, where Article III judges would be forced to hear, on the merits, all

of the reasons why the prior state-court judgments are not res judicata or otherwise dispositive as to their "new" federal-court claims.[19]

Even the only slightly less restrictive approach of the Seventh Circuit, which reserves *Rooker-Feldman* solely for cases where "the injury [claimed in the federal complaint] is inflicted by the state court's decision" but not for cases where the federal complaint seeks to relitigate the identical claim already adjudicated by the state courts, *Durgins v. City of E. St. Louis*, 272 F.3d 841, 844 (7th Cir. 2001) (citing *GASH*, 995 F.2d 726), is divorced from the statutory bases for *Rooker-Feldman*. The Seventh Circuit's artificial division between these two categories of cases fails to acknowledge that *both* involve the sort of "review" of state-court decisions reserved to this Court by Section 1257 and thus prohibited by the *Rooker-Feldman* doctrine. Indeed, this Court "reviews" both kinds of cases under Section 1257. *Compare Shaffer v. Heitner*, 433 U.S. 186, 216-17 (1977) (holding that Delaware Supreme Court erred in affirming Delaware state courts' exercise of personal jurisdiction over nonresident defendants) *with Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that a restaurant's exclusion of an African-American patron was not state action in violation of the equal protection clause of the Fourteenth Amendment).

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[19] Under the Seventh and Ninth Circuits' overly restrictive versions of *Rooker-Feldman*, clearly abusive successive lawsuits on the same claims brought by vexatious litigants could not be dismissed without a merits inquiry. *See, e.g., Mills v. Harmon Law Offices*, 344 F.3d 42, 45-46 (1st Cir. 2003) (*Rooker-Feldman* applied where plaintiffs "have trampled through no less than six Courts . . . to pursue this frivolous and baseless claim"); *Tropf v. Fidelity Nat'l Title Ins.*, 289 F.3d 929, 931, 938 (6th Cir. 2002) (*Rooker-Feldman* applied to two consolidated federal suits because plaintiffs had already been "denied relief by five separate state courts").

Significantly, the line the Seventh Circuit has strained to draw based on its restrictive approach – "If the federal plaintiff was the plaintiff in state court, he must contend with res judicata; if the federal plaintiff was the defendant in state court, he must contend with the *Rooker-Feldman* doctrine," *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699, 702 (7th Cir. 1998) – would make the *Rooker* case itself fall outside the *Rooker-Feldman* doctrine: The Rookers were the plaintiffs in both cases. 263 U.S. at 414; *see also* 261 U.S. at 115-16. That is a compelling indicator that the Seventh Circuit's approach is wrong.

Moreover, the Seventh Circuit conflates the jurisdictional inquiry – which turns on Section 1257 and the "original jurisdiction" provisions for the district courts – with the separate question of the availability of an independent federal cause of action. The principal Seventh Circuit decision expounding upon its restrictive approach relied upon this misunderstanding of the *Rooker* and *Feldman* decisions:

> GASH objects to the outcome of a judicial proceeding and filed a separate suit to get around it. This runs headlong into [*Rooker*], and [*Feldman*], *which hold that carrying out a judicial decision does not independently violate the Co* .*titution*.

GASH Assocs., 995 F.2d at 727 (emphasis added). But *Rooker* and *Feldman* are not fairly read as addressing whether the execution of a state judicial decision gives rise to a cause of action for "violat[ing] the Constitution." That would be a merits inquiry. Rather, *Rooker* and *Feldman* stand for the proposition that whether "carrying out a judicial decision" would "independently violate the Constitution" is irrelevant, because no federal court except for this one could hear the merits of that constitutional challenge. In short, the restrictive approach of the Ninth and Seventh Circuits cannot be reconciled either with Section 1257 or with the *Rooker* decision itself.

* * *

In the end, ExxonMobil strains to come up with a coherent justification for allowing federal district courts to become guarantors of "insurance policy" lawsuits on identical claims already litigated to judgment in a state court. It fails in this task. By contrast, the decision of the Third Circuit, which found this case to be an "easily cabined" but nonetheless "classic invocation of the *Rooker-Feldman* jurisdictional bar" (Pet. App. 8a) is compelled by the statutes defining the limited scope of federal jurisdiction, consistent with the identifiable policies undergirding our system of judicial federalism, and in furtherance of the critical federal interest in preventing and minimizing federal court interference with state-court decisions and the state-court appellate process. The Court should affirm the Third Circuit's correct and sensible ruling.

CONCLUSION

This suit should either be dismissed as moot, or the court of appeals' decision dismissing it for lack of jurisdiction should be affirmed.

Respectfully submitted,

KENNETH R. ADAMO
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

GREGORY A. CASTANIAS
(Counsel of Record)
LAWRENCE D. ROSENBERG
WILLIAM K. SHIREY II
JULIET JOHNSON KARASTELEV
ESTHER SLATER MCDONALD
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent

January 4, 2005

PERTINENT STATUTORY PROVISIONS

TITLE 28–JUDICIARY AND JUDICIAL PROCEDURE

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

* * *

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state . . . as plaintiff and citizens of a State or of different States.

* * *

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

* * *

[The authenticated records and judicial proceedings of any court of any such State, Territory or Possession] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

IN THE UNITED STATES OF APPEALS FOR THE THIRD CIRCUIT

EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA INC., AND MOBIL YANBU PETROCHEMICAL COMPANY INC.,

Plaintiffs-Appellees,

v.

SAUDI BASIC INDUSTRIES CORPORATION,

Defendant-Appellant.

No. 02-2130

* * *

APPELLEES' MOTION TO STAY CONSIDERATION OF APPEAL PENDING OUTCOME OF RELATED PROCEEDINGS

* * *

ARGUMENT

* * *

NJ-II and the Related Delaware Case, as SABIC concedes, involve "essentially the same claims." (*See* Appellant's Br. at 10)[1] The two cases revolve around the same exact dispute, including the same Joint Ventures and the same Joint Venture Agreements. In NJ-II, ExxonMobil

[1] As explained in ExxonMobil's Brief, SABIC's claims in NJ-I are also closely related to ExxonMobil's claims in NJ-II. Indeed, the district court so held in its April 3, 2002 Opinion consolidating the two matters. *See Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F. Supp. 2d 378, 416 (D.N.J. 2002), *reprinted in* Joint Appendix at page A.036.

claims that SABIC overcharged the Joint Ventures in breach of the Joint Venture Agreements. In the Related Delaware Case, a jury ***has already decided*** that SABIC overcharged the very same Joint Ventures in breach of the very same Joint Venture Agreements. Although SABIC seeks to overturn the Delaware verdict, until the Delaware courts render a final decision, the issue at the base of NJ-II—whether SABIC overcharged the Joint Ventures—already has been adjudicated, rendering meaningless and advisory any proceedings in the instant appeal at this time.

Moreover, if SABIC is unsuccessful on appeal in Delaware, the judgment in the Related Delaware Case—finding that SABIC overcharged the Joint Ventures—would be *res judicata*, rendering moot ExxonMobil's claims in NJ-II and, of course, SABIC's interlocutory appeal. In that event, ExxonMobil will dismiss NJ-II, and there will be no need for this appeal to go forward at all.

In summary, there is no current need for this Court to review the district court's refusal to dismiss ExxonMobil's claims in NJ-II or to determine the FSIA issues presented in this appeal. Any further proceedings in this appeal now will potentially waste the resources of the Court and the parties.

* * *

IN THE UNITED STATES OF APPEALS FOR THE THIRD CIRCUIT

EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA INC., AND MOBIL YANBU PETROCHEMICAL COMPANY INC.,

Plaintiffs-Appellees,

v.

SAUDI BASIC INDUSTRIES CORPORATION,

Defendant-Appellant.

No. 02-2130

BRIEF OF APPELLEES

* * *

STATEMENT OF JURISDICTION[2]

* * *

The district court properly concluded that it had subject matter jurisdiction over SABIC pursuant to 28 U.S.C. § 1330(a), because SABIC "is not entitled to immunity under sections 1605-1607" of Title 28. That subject matter jurisdiction is the central issue on this appeal.

* * *

---

[2] On March 21, 2003, the jury in the Delaware suit returned a verdict of $416,880,764 against SABIC and in favor of ExxonMobil. As the claims in the Delaware suit and NJ-II are essentially identical, ExxonMobil is moving, concurrently with the filing of this Brief, to stay further proceedings in this appeal pending SABIC's appeal in the Delaware suit. Assuming SABIC is unsuccessful in its Delaware appeal, ExxonMobil will dismiss NJ-II, rendering this appeal moot. In addition, the district court has recently stayed all proceedings in NJ-I pending the outcome of SABIC's appeal in the Delaware suit.

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION,

Plaintiff,

v. **C.A. No. 00C-07-161 JRJ**

MOBIL YANBU PETROCHEMICAL COMPANY, INC., AND EXXON CHEMICAL ARABIA, INC.,

Defendants.

BEFORE: THE HONORABLE JAN R. JURDAN

HEARING TRANSCRIPT
Thursday, February 7, 2002

[2] APPEARANCES:

* * *

JONES, DAY, REAVIS & POGUE
NORTH POINT
901 LAKESIDE AVENUE
CLEVELAND, OH 44114
BY: KENNETH R. ADAMO, ESQUIRE
Attorney for Plaintiff

* * *

WEIL, GOTSHAL & MANGES LLP
767 FIFTH AVENUE:
NEW YORK, NY 10153
BY: JAMES W. QUINN, ESQUIRE
BY: DAVID J. LENDER, ESQUIRE

Attorneys for Defendants

* * *

[21] * * *

MR. ADAMO: Your Honor, I would like to—two of the points you made—and I'll stay with the point we are now, but I do want to address this allegation that we somehow misused mediation information, because I don't want you thinking that that's what happened. That's not what happened.

In any event, Special Discovery Master Weiss, to the best of my knowledge, did not condition his stay of discovery on the alleged royalty overcharge on anything that was going on here. He conditioned it on the fact that we have very strongly argued that that's the tail of the—tip of the tail of the dog, trying to take a Great Dane and go like this with it. [22]

It's collateral. And we have motions pending in front of Judge Walls to take that out of the case completely. And his decision was, other than the consent order that allowed these one or two items to be raised just prior to the mediation, which is really where—

THE COURT: I read his order.

MR. ADAMO: —the flag came from that they were about to jump us was not in the mediation. It was all this pushing about getting a discovery. We entered into a stipulation that, if the mediation was unsuccessful, this would then be revisited. And he stayed based on the fact that we argued these collateral issues and we have motions to dismiss.

What he does, when he finds out that you've agreed to go forward here—I agree with you. I'm certainly not going to pre-presume that I would have any idea what Judge Weiss would do.

But by the same token, the usability of the discovery here, at least in my experience when I've had parallel cases where we've crossed used and agreed, really isn't dependent upon

discovery independently being available in the second case and discovery being [23] open. – Because I'm going to effectively stipulate that trial, which, of course, is what ultimately counts, is where this is going to be usable. And whether the discovery is going on in the New Jersey cases or not doesn't control my agreement that the discovery here be available for use in that case.

I know that sounds like a distinction without a difference. But I've run into this a lot. I can have three cases, have discovery in this one, if I "stip" it's usable in the other two, the discovery actually could be closed in the other two, and my "stip" would still allow that to be used at trial.

MR. QUINN: Two quick points.

One, and this is really kind of a, you know, a side trail with regard to Special Master Weiss. He didn't put the stay in place because this was a collateral issue. He said, Let's wait to see what Judge Walls does. That's all. If Judge Walls is going to have it all in, then you can go ahead with discovery. That's what he actually said.

And on the other point—

THE COURT: That's not exactly what you wanted, though; right? You would have liked to proceed with [24] discovery.

MR. QUINN: Absolutely. No question about it. Your Honor, they owe us the hundreds of millions of dollars, not the other way around.

We are prepared to go forward. And, Your Honor, we're prepared to go forward quickly and have the case—if we're going to go and there's not going to be duplication, let's get the case moving and tried here in Delaware. And we have a schedule that we can propose today to get the case tried before the end of the year. It's our claim. It's our money. We'd like to go forward.

* * *

(9)

No. 03-1696

Supreme Court, U.S.
FILED
FEB 3 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,
Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF

ANDREW S. POLLIS
DAVID J. MICHALSKI
HAHN LOESER & PARKS LLP
3300 BP Tower
200 Public Square
Cleveland, Ohio 44114
(216) 621-0150

ELIZABETH J. SHER
PITNEY HARDIN LLP
200 Campus Drive
Florham Park, New Jersey 07932
(973) 966-6300

JAMES W. QUINN
DAVID LENDER
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-7000

GREGORY S. COLEMAN
Counsel of Record
CHRISTIAN J. WARD
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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PETITIONERS' REPLY BRIEF

The *Rooker-Feldman* doctrine is grounded in a negative inference from 28 U.S.C. §1257 and is a narrow exception to the broad federal jurisdiction granted by Congress under article III of the Constitution. Its only application is to prevent lower federal courts from exercising appellate jurisdiction over state-court judgments—that is, from hearing a complaint that a party has been injured by a state-court judgment and seeking an order reversing, vacating, or otherwise nullifying that judgment.

Rooker-Feldman was never intended to address the entirely separate issue of concurrent state and federal jurisdiction, an inherent feature of the "complementary systems for administering justice in our Nation." *Kowalski* v. *Tesmer*, __ U.S. __, 125 S.Ct. 564, 569 (2004). Concurrent jurisdiction permits parallel litigation of identical claims in state and federal courts, leading unavoidably in some cases to the potential risk of competing judgments. But the task of dictating when a race to judgment may proceed and when it should be declared over falls not to tightly circumscribed jurisdictional exceptions like *Rooker-Feldman*, but to well-known, well-developed, and nonjurisdictional legal principles created for that very purpose. In appropriate and limited circumstances, nonjurisdictional abstention or prudential-dismissal doctrines may avoid a race to judgment altogether. And when a state court wins a permissible race to judgment, the Full Faith and Credit Act, 28 U.S.C. §1738, requires federal courts to give that judgment precisely the same preclusive effect it enjoys in the rendering state. The district court in this proceeding should have been permitted to address the preclusive effect of the Delaware judgment on the parties' mutual claims, and there is no suggestion that the district court was unwilling or unable to do just that, if given the opportunity.

The core fallacy of the Third Circuit's expansion of *Rooker-Feldman* is that it improperly equates the wrap-up

process of declaring the winner of a race to judgment with a de facto appeal of the first judgment. SABIC's theory of vanishing subject matter jurisdiction is both unprecedented and insupportable. A parallel federal lawsuit with an independent basis for subject matter jurisdiction does not instantaneously morph into a jurisdictionally barred appeal the minute the state court enters its judgment. The continued pendency in federal court of claims that have been resolved in state court does not constitute an improper de novo review of the state judgment because the claims do not seek to reverse, vacate, or otherwise nullify that judgment. The federal proceeding is merely a (temporary) continuation of a pre-existing lawsuit. There is no plausible justification for supplanting and rendering nugatory Congress's statutory requirement that federal courts apply state-law preclusion principles and replacing it with a new common-law bar to federal jurisdiction that suddenly materializes the moment an issue reaches conclusion in state court.

The inapplicability of the *Rooker-Feldman* doctrine should have been especially apparent in this case because ExxonMobil, the victor in Delaware, obviously seeks no review of the Delaware superior court's judgment in its favor, which the Delaware Supreme Court has now affirmed. The Third Circuit's decision was based in part on its speculation that the Delaware Supreme Court might reverse and that ExxonMobil might seek to undo that hypothetical adverse determination. But it was improper to base a jurisdictional inquiry on speculation about future events—as amply illustrated by the fact that the court's speculation proved wrong. Applying *Rooker-Feldman* speculatively, as the Third Circuit did, improperly undermines the duality of our judicial system by jurisdictionally ousting parallel actions that are within the original jurisdiction granted to the federal district courts. To maintain the carefully crafted structure of concurrent federal jurisdiction—as enacted by Congress and explicated by the Court over many decades—the Court should clarify that

Rooker-Feldman is confined to instances in which a federal plaintiff actually seeks direct "review" of a previously made state-court decision in federal district court.

SABIC's new assertion that the case became moot the moment the Delaware superior court rendered judgment is belied by SABIC's continued vigorous attempts to pursue appellate remedies. Although the Delaware Supreme Court has affirmed the judgment, SABIC continues to seek re-hearing and intimates it will seek review from this Court. Regardless of the ultimate finality of the Delaware judgment, the Third Circuit's erroneous application of *Rooker-Feldman* is not moot because reversal by the Court will permit the district court to perform a proper comprehensive preclusion analysis that evaluates not only ExxonMobil's affirmative claims in this case, but also SABIC's ability to further contest ExxonMobil's affirmative defenses to SABIC's claims in NJ-I. In the end, SABIC fails to recognize the distinction the Court first made many years ago between a continuing live controversy over federal jurisdiction and resolution in another forum of a dispute on the underlying merits. If further federal litigation is barred in this case, it is barred by preclusion principles, not mootness. And preclusion is an affirmative defense that must be addressed by the federal district court in the first instance, not sua sponte on appeal.

ARGUMENT

I. THE THIRD CIRCUIT'S EXPANSION OF *ROOKER-FELDMAN* IS INCONSISTENT WITH THE DUAL CONGRESSIONAL COMMANDS OF CONCURRENT JURISDICTION AND RESPECT FOR STATE PRECLUSION LAW.

The Court should reject an expansive reformulation of *Rooker-Feldman* that displaces state preclusion law and erodes the duality of our judicial system. SABIC's application of the *Rooker-Feldman* jurisdictional bar to any case in which issues are litigated to judgment in a state court conflicts with Congress's express command to accord respect to

state-law preclusion principles and with decades of the Court's jurisprudence interpreting that command. *Rooker-Feldman* does not bar every claim that might be barred by res judicata, nor does it forbid every race to judgment on parallel claims. *Rooker-Feldman* bars only those federal actions that seek direct nullification of decisions by state courts. The doctrine has no application to this case, in which no state court has even rendered an adverse judgment against ExxonMobil and in which ExxonMobil never asked the federal district court to review the decision of a state court.

The court of appeals articulated two related yet distinct rationales for its holding, and both were erroneous. The first "prong" of the court's analysis focused on the assertion that ExxonMobil's claims arising out of SABIC's secretly overcharging the joint ventures were "actually litigated" in the Delaware trial court. Pet. App. 6a-8a. That analysis conflated *Rooker-Feldman* with res judicata, effectively supplanting the nonjurisdictional principle of claim preclusion with an overriding jurisdictional bar. And it ignores that the relief sought in ExxonMobil's action was consistent with the result in Delaware and could not nullify the Delaware trial court's judgment. The second "prong" invoked by the court of appeals relied on speculation that the Delaware Supreme Court might overturn the trial court's judgment, which, the court reasoned, would render ExxonMobil's federal suit an action "to invalidate a final judgment of the state court." *Id.*, at 8a. The court purported to premise its ultimate *Rooker-Feldman* holding on the combined effect of those two "prongs." *Id.*

A. The Court Should Reject Any Conflation of *Rooker-Feldman* with Ordinary Preclusion Principles.

Rooker-Feldman cannot jurisdictionally bar ExxonMobil's claims in federal court because those claims do not seek to undo a state-court judgment. *Cf. Friedman's, Inc.* v. *Dunlap*,

290 F.3d 191, 200 (CA4 2002) (Niemeyer, J., dissenting) ("The fundamental purpose of the *Rooker-Feldman* doctrine—to prohibit appeals to federal court *to review* a state court judgment—cannot be fulfilled in an action, not seeking to review a state court judgment, but to reinforce it with a parallel federal judgment."). There is a fundamental difference between appellate review of a state-court judgment, which federal district courts have no power to undertake, and relitigation of identical claims. An action is attempted appellate review only if it seeks to reverse, vacate, or otherwise nullify a prior judgment of another court. Simply put, an appellate judgment directly trumps an earlier judgment and, if it conflicts with that judgment, renders it null and void. *See Rooker* v. *Fid. Trust Co.*, 263 U.S. 413, 414 (1923).

In contrast, parallel litigation of similar or identical claims creates a potential (and fundamentally different) risk that two courts of original jurisdiction may independently adjudicate the claims and enter judgments covering the same subject matter. *See Growe* v. *Emison*, 507 U.S. 25, 32 (1993) ("[F]ederal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter."). The judgments may be inconsistent with one another and may create conflicting obligations for the parties, but neither judgment asserts jurisdiction over the other court or authoritatively declares invalid the judgment of the other court. *See Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 230 (1922) ("Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.").[1] The risk created by parallel litigation is not the arrogation of appellate jurisdiction by federal district courts, but

[1] *Kline* distinguished actions in personam from actions in rem, in which, necessarily, jurisdiction is lodged with whichever court—state or federal—first takes jurisdiction over the subject property. 260 U.S., at 229. Unlike *Rooker-Feldman*, the rule regarding in rem jurisdiction has nothing to do with whether either court has yet rendered a judgment.

rather the more practical concern of preventing intersystem conflicts by courts presumptively possessing concurrent jurisdiction, which is ordinarily obviated by the proper application of abstention or preclusion doctrines. *See Growe*, 507 U.S., at 32 ("In rare circumstances, . . . principles of federalism and comity dictate" abstention or deferral); *Kline*, 260 U.S., at 230 ("Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction.").

In defending the Third Circuit's *Rooker-Feldman* approach, SABIC redefines it, focusing entirely on whether claims were "actually litigated" in state court, without regard to whether the federal plaintiff seeks to invalidate a state-court judgment. *E.g.*, SABIC Br. 13 (*Rooker-Feldman* bars "federal district courts from entertaining suits that raise claims or issues already adjudicated in a state-court proceeding"). In SABIC's version of *Rooker-Feldman*, it is sufficient that the underlying claims have proceeded to judgment in a state court. *Id.*, at 25 ("[W]hen a dispute has reached a final judgment in state court (whether favorable or unfavorable), then all subsequent litigation must be pursued through the state appellate system."). The court of appeals at least recognized that whether the federal plaintiff seeks to "invalidate a final judgment of the state court" is relevant to determining if the federal action involves forbidden de facto appellate review. Pet. App. 8a.

SABIC goes further, relying—repeatedly—on the fallacious contention that any relitigation of issues already adjudicated amounts to appellate "review" of the previous adjudication, even if the relitigation is conducted without any reference to the work done by the earlier-acting court. *E.g.*, SABIC Br. 29 (characterizing "[a] federal court's issue-by-issue 'relitigation' of the identical claims" as "in essence *de*

novo appellate review"). But de novo review is a process for asserting appellate jurisdiction over a trial court and deciding whether the court's decision should be affirmed or reversed; it is not merely the independent litigation of claims under a grant of original jurisdiction. *Cf. City of Chi.* v. *Int'l Coll. of Surgeons*, 522 U.S. 156, 171 (1997) (distinguishing trial de novo from appellate review).

Expanding *Rooker-Feldman* to encompass every case involving claims or issues that were previously litigated in a state court without regard to whether the federal action actually attempts to nullify the state-court judgment conflicts with Congress's delineation of federal-court jurisdiction as interpreted by this Court. As *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), makes clear, a federal suit can be an attempt to review a state-court decision only if the relief sought by the federal plaintiff would nullify that decision. The distinction in *Feldman* between those claims that were jurisdictionally barred and those that were not turned on the remedy sought through each claim, not on whether the claims were actually litigated in the state court. The federal plaintiffs' claims that they were legally wronged by the denial of their particular petitions for admission to the D.C. bar were "inextricably intertwined with the District of Columbia Court of Appeals' decisions" and would have "required the District Court to review" those adverse decisions because the only effective remedy a federal court could award would be to directly order the defendant D.C. court to reverse its decisions. *Id.*, at 486-87. The plaintiffs' remaining allegations, however, "involve[d] a general attack on the constitutionality of" the bar admission rule, and the relief sought by those claims—a declaration that the rule was unconstitutional—would "not require review of a judicial decision in a particular case." *Id.*, at 487. At most, a federal court's declaration that the rule was unconstitutional would differ from the D.C. court's implicit holding that its rule was

constitutional.[2] Accordingly, there was no jurisdictional bar to the district court's considering the general constitutional claims on the merits, including the affirmative defense of res judicata. *Id.*, at 487-88.

The fact that ExxonMobil's federal action was filed before any state-court judgment existed further demonstrates that ExxonMobil has never sought review of the state-court judgment. "[I]f the federal action was filed prior to the state action, it cannot be said that the party aggrieved by the state court's ruling filed the federal case to 'appeal' the state court's ruling." *Bosdorf* v. *Beach*, 79 F.Supp.2d 1337, 1339 (S.D. Fla. 1999); *accord Doctor's Assocs., Inc.* v. *Distajo*, 107 F.3d 126, 138 (CA2 1997). And even SABIC recognizes that "the *Rooker-Feldman* doctrine prevents *disappointed* litigants from abandoning the state-court processes." SABIC Br. 28 (emphasis added). SABIC fails to offer anything more than conclusory assertions to explain how the continuation of a preexisting federal action by a satisfied state-court litigant, like ExxonMobil, could involve "review" of a favorable state-court decision.

Apparently conceding that *Rooker-Feldman* would not have barred ExxonMobil's federal suit before the Delaware trial court issued its judgment,[3] SABIC reconceptualizes *Rooker-Feldman* as a doctrine of vanishing jurisdiction, under which original jurisdiction once present can suddenly evaporate "once the [state] trial court had reached a judgment." SABIC Br. 32. There is neither precedent nor principle to support SABIC's theory that a federal court "relinquishes original jurisdiction" merely because a state

[2] Indeed, it is not entirely clear that the general constitutional attack was not "actually litigated as part of the dispute." SABIC Br. 20. At least in Feldman's case, the issue was raised in a letter to the D.C. court. *Feldman*, 460 U.S., at 467.

[3] Although that concession is inconsistent with the second "prong" of the Third Circuit's *Rooker-Feldman* analysis. *See* Part I.B, *infra*.

court reaches final judgment on parallel claims. *Id.*, at 34; *cf. Freeport-McMoran, Inc.* v. *K N Energy, Inc.*, 498 U.S. 426, 428 (1991) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events."). It is inconsistent with the statutory structure under which (1) "our dual system of federal and state governments allows parallel actions to proceed to judgment until one becomes *preclusive* of the other," *Vulcan Chem. Techs., Inc.* v. *Barker*, 297 F.3d 332, 340 (CA4 2002) (emphasis added), and (2) "[f]ederal courts may not 'employ their own rules . . . in determining the effect of state judgments,' but must 'accept the rules chosen by the State from which the judgment is taken.'" *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 373 (1996).

In many instances, our dual jurisdictional structure permits a "race to judgment" on identical claims. *E.g.*, *Green* v. *City of Tucson*, 255 F.3d 1086, 1097 (CA9 2001) (en banc), *overruled in part on other grounds*, *Gilbertson* v. *Albright*, 381 F.3d 965 (CA9 2004); *accord Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 524-25 (1986). Specifically, concurrent jurisdiction permits a race to *preclusive* judgment. *E.g.*, *Vulcan*, 297 F.3d, at 338; *accord Kline*, 260 U.S., at 230. Abstention, deferral, and prudential-dismissal doctrines reflect the determination that, in very limited circumstances, that race should not be allowed to proceed. *See, e.g.*, *Growe*, 507 U.S., at 32; *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813-17 (1976). But when the race is on, *state* preclusion rules, not jurisdictional doctrines like *Rooker-Feldman*, draw the finish line. *See Matsushita Elec.*, 516 U.S., at 373.

SABIC's version of *Rooker-Feldman* would supplant state preclusion law, which SABIC regards as presenting "too many vagaries." SABIC Br. 34. But Congress has expressly commanded the federal courts to respect those "vagaries." *See, e.g.*, *Matsushita*, 516 U.S., at 373; *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) ("It is now

settled that a federal court must give to a state-court judgment *the same* preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." (emphasis added)); *Allen* v. *McCurry*, 449 U.S. 90, 96 (1980) ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments *whenever the courts of the State from which the judgments emerged* would do so." (emphasis added)). In stark contrast to the Court's precedent, SABIC seeks to replace respect for state-law preclusion principles with a federal common-law rule, under which *Rooker-Feldman* "bars *federal-court* relitigation of claims" even when the decision is not entitled to preclusive effect. SABIC Br. 38. SABIC urges, for example, that federal courts should disregard the principle applied by a substantial minority of states that preclusive effect does not attach to a judgment until the highest state court has rendered a final judgment or the time to appeal has expired. *Id.*, at 37 & n.16. That result cannot be squared with the requirement that federal courts give preclusive effect to state judgments when, and only when, the courts of the rendering state would give that effect. *See Noel* v. *Hall*, 341 F.3d 1148, 1160 (CA9 2003).

SABIC offers no justification for replacing traditional preclusion principles with an unbending jurisdictional bar, but blithely dismisses the inquiry by observing that, under its *Rooker-Feldman* approach, federal courts will rarely have occasion to make preclusion determinations. SABIC Br. 40. But federal courts should apply traditional preclusion doctrines when asked to pass on issues that have previously been litigated in state court. SABIC's prediction of "the bizarre result of allowing federal review of state-law determinations," *id.*, at 28 n.3, simply ignores that preclusion principles are both efficacious and congressionally mandated to avoid relitigation. Preclusion—in appropriate cases—prevents "full scale 'relitigation,'" *id.*, at 29, of identical claims. Numerous examples of federal courts applying state res

judicata law to claims that were previously "actually litigated" in state courts demonstrate that SABIC's approach to *Rooker-Feldman* cannot be correct. *See, e.g.*, *Matsushita*, 516 U.S., at 373-74; *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 466-67, 479-80 (1982); *Allen*, 449 U.S., at 92-94 & n.2; *Guerrero* v. *Katzen*, 774 F.2d 506, 508 (CADC 1985); *Baron* v. *Brackis*, 312 F.Supp.2d 808, 813 (E.D. Va. 2004) (distinguishing *Rooker-Feldman* from res judicata in determining whether plaintiffs' previously adjudicated claims were barred). SABIC attempts to distinguish its version of *Rooker-Feldman* by observing that res judicata may preclude issues that could have been raised in the previous action but were not. SABIC Br. 36.[4] But SABIC cannot evade the necessary consequence of its *Rooker-Feldman* approach for any claim in the federal action that was actually litigated in a state-court proceeding. Under SABIC's *Rooker-Feldman* approach, each of the cases just cited (and hundreds, if not thousands, more) should never have addressed preclusion at all because those claims would have been jurisdictionally barred, notwithstanding that Congress's statutory scheme plainly contemplates that federal courts will have jurisdiction to consider affirmative defenses like preclusion in many cases involving claims that were "actually litigated" to final judgment in state courts.

Rooker-Feldman bars "a party *losing* in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the *losing* party's claim that the state judgment itself violates the *loser's* federal rights." *Johnson* v. *De Grandy*, 512 U.S. 997, 1005-06 (1994) (emphasis added). The only other case SABIC has ever cited in which a court applied *Rooker-Feldman* as a jurisdictional bar supplanting a res judicata

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[4] Those courts of appeals that have expressly elided *Rooker-Feldman* with preclusion do not, in fact, maintain that distinction. *See Moccio* v. *N.Y. State Office of Court Admin.*, 95 F.3d 195, 199-200 (CA2 1996).

analysis against a federal plaintiff who *prevailed* in the state-court proceeding is *Friedman's*, in which the Fourth Circuit applied *Rooker-Feldman* merely because "Friedman's [was] asking the federal courts to decide precisely the same issue already decided by a West Virginia state court." 290 F.3d, at 197. Judge Niemeyer's dissent explained why the majority's application of *Rooker-Feldman*, like that of the Third Circuit in this case, was wrong: "This action does not seek to review any state judgment; it seeks to obtain in federal court *the same* relief already obtained in state court." *Id.*, at 200 (Niemeyer, J., dissenting). As in this case, "the appropriate principle to apply would be either *res judicata* or full faith and credit." *Id.* There was "no precedent to support application of" *Rooker-Feldman* in *Friedman's*, *id.*, at 201, or in this case, suggesting that the vast majority of courts recognize the common-sense proposition that parties do not seek "review" of favorable judgments. Even when the federal plaintiff did not prevail in the state action, "[n]ormally the *Rooker-Feldman* doctrine applies when the injury is inflicted by the state court's decision, while if all the state court has done is fail to rectify an injury caused by some other actor then claim preclusion is the appropriate doctrine." *Durgins* v. *City of E. St. Louis*, 272 F.3d 841, 844 (CA7 2001); *accord Noel*, 341 F.3d, at 1163.[5]

[5] Although previously asserting that there was no conflict, SABIC BIO 7-9, SABIC now urges the Court to reject what it now labels the Seventh and Ninth Circuits' "extraordinarily restrictive view." SABIC Br. 44. But the only relevant restriction on *Rooker-Feldman* imposed by those circuits is the one necessitated by the doctrine's actual scope, nature, and statutory origins—that it applies only when the federal plaintiff seeks relief that would turn the federal action into a de facto review of a state-court decision. Moreover, SABIC's attempt to discredit the Seventh Circuit's approach by attributing an untenable bright-line rule to that circuit, *id.*, at 47, ignores the context in the very case SABIC quotes for the supposed "rule." *See Centres, Inc.* v. *Town of Brookfield*, 148 F.3d 699, 702-03 (CA7 1998) (describing the "rule" as "a general guideline" and noting that "[i]ts utility is limited by its exceptions").

SABIC's reliance on *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989), is also misplaced. The Court in *ASARCO*, responding to a specific suggestion that the petitioners could seek an order in federal district court directly overruling an adverse judgment by a state trial court, *id.*, at 623 (citing Brief for United States as Amicus Curiae, *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605 (1989) (No. 87-1661), 20 n.14, available at 1989 WL 1126812, at *20 n.14), commented that such an action "would be an attempt to obtain direct review of the Arizona Supreme Court's decision in the lower federal courts, and would represent a partial inroad on *Rooker-Feldman*'s construction of 28 U.S.C. § 1257." *Id.*, at 622-23. That dicta does not, as SABIC suggests, support expanding *Rooker-Feldman* to encompass any case in which similar issues have been litigated in a state court without regard to whether the federal action seeks to nullify the state judgment.

Nor does *Heck* v. *Humphrey*, 512 U.S. 477 (1994), assist SABIC. In the context of a 42 U.S.C. §1983 action by a state prisoner, *Heck* explained that "the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.*, at 487. If, however, "the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed." *Id.* In the first circumstance described in *Heck*, as in federal habeas corpus actions (which are a statutory exception to *Rooker-Feldman*, *e.g.*, *Noel*, 341 F.3d, at 1155), the federal plaintiff is seeking "review" of a state-court judgment because the relief sought in the federal action would invalidate the prior adjudication, not simply because identical issues are present.

Finally, confining *Rooker-Feldman* to federal actions in which plaintiffs seek to invalidate a state-court judgment does not, as SABIC asserts, premise a federal court's jurisdiction on subjective intentions or artful pleading. The distinction between a federal action seeking the same relief already granted by a favorable state-court judgment and one seeking to nullify an adverse judgment is an objective one and easily made. Indeed, it is SABIC's repeated and misplaced reliance on ExxonMobil's alleged "admission" that it wanted to maintain its federal suit as an "insurance policy," *e.g.*, SABIC Br. 2, that attempts to inject subjective intentions into the *Rooker-Feldman* jurisdictional inquiry.[6]

ExxonMobil sought to maintain the federal action, as is its right under the congressionally crafted structure of concurrent jurisdiction, as an alternative forum for trying its claims against SABIC in the event that the Delaware trial judgment was nullified on some ground that would not preclude a federal-court trial of those claims. *See, e.g.*, JA 42; *New Orleans Pub. Serv., Inc.* v. *Council of New Orleans*, 491 U.S. 350, 359 (1989) ("The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."); *Kline*, 260 U.S., at 234 ("The [federal plaintiff], however, had the undoubted right . . . to invoke the jurisdiction of the federal court and that court . . . could not abdicate its authority or duty in favor of the state jurisdiction."). The only reason parallel actions existed was SABIC's preemptive forum shopping in filing its declaratory-judgment action in Delaware "to obtain an adjudication that (*inter alia*) Delaware's three year statute of limitations barred

[6] The "insurance policy" phrase was coined by the court of appeals, JA 35, not ExxonMobil, and SABIC grossly misrepresents ExxonMobil's position on the relation of the federal litigation to the parallel action in Delaware. ExxonMobil has never said it intended or desired to seek invalidation of any Delaware judgment. Indeed, it expressly disavowed any such intent. JA 42, 54 & n.2.

ExxonMobil's claims." Addendum to SABIC Corr. Supp. Br. 22a. The Delaware Supreme Court rejected SABIC's limitations argument, but if it had ruled in SABIC's favor and reversed the Delaware trial-court judgment on Delaware limitations grounds, that judgment, although adverse to ExxonMobil, would have no bearing on the merits of ExxonMobil's claims in the federal action.

B. The Third Circuit's Misapplication of "Inextricably Intertwined" Eviscerates Concurrent Jurisdiction by Relying on Speculation About Pending State-Court Decisions.

The second "prong" of the court of appeals's *Rooker-Feldman* analysis—its misapplication of *Feldman*'s "inextricably intertwined" standard based on the speculative possibility that the Delaware Supreme Court might render a judgment adverse to ExxonMobil, Pet. App. 8a—ignores the possibility that a pending state decision may be decided on grounds that have no relevance whatever to the merits of the federal action. The court reasoned that reversal on any ground would necessarily transform the federal action into a de facto appellate review of the Delaware Supreme Court's judgment, despite ExxonMobil's disavowal of any intent to seek such review in the federal district court. *Id.* Premising federal jurisdiction on speculation about future events—speculation that, as the Delaware Supreme Court's affirmance illustrates, may prove to be utterly wrong—conflicts with the principle that jurisdiction should ordinarily be ascertainable at the time the federal action is commenced. *See Freeport-McMoran*, 498 U.S., at 428.

It is this aspect of the Third Circuit's approach—not simply, as SABIC misconstrues ExxonMobil's argument to be, the application of *Rooker-Feldman* to any claims that were "actually litigated"—that threatens to eviscerate concurrent federal and state jurisdiction. If the possibility of a future adverse state judgment, on any conceivable grounds, could

really divest a federal district court of jurisdiction over parallel claims, then *Rooker-Feldman* would attach just as firmly at the state-court trial stage as when a favorable judgment is pending on appeal. "[I]f the 'inextricably intertwined' test means that a federal plaintiff cannot raise issues that are 'inextricably intertwined' with issues raised in simultaneous ongoing state court litigation, *Rooker-Feldman* would prevent the parallel state and federal litigation that is one of the hallmarks of our federal system." *Kougasian* v. *TMSL, Inc.*, 359 F.3d 1136, 1143 (CA9 2004).

Friedman's adopted the same flawed rationale applied by the Third Circuit in this case. 290 F.3d, at 195 (applying *Rooker-Feldman* in part because the federal plaintiff "want[ed] a federal order compelling arbitration at the ready in case the West Virginia Supreme Court of Appeals . . . reverses the decision of the lower state court"). That application of *Rooker-Feldman* was "inappropriate" because "even if the West Virginia Supreme Court were to affirm . . . , then the appropriate principle to apply would be either *res judicata* or full faith and credit." *Id.*, at 200 (Niemeyer, J., dissenting).

In cases in which the relevant state-court decision is pending, abstention and prudential-dismissal doctrines carefully balance efficiency and comity with the strong principle in favor of federal courts exercising the jurisdiction entrusted to them by Congress, notwithstanding SABIC's dismissive characterization of those doctrines as "purely" the Court's "judicial creations." SABIC Br. 43; *see Noel*, 341 F.3d, at 1164; *cf. Kowalski*, 125 S.Ct., at 569-70 & n.4 (noting that the "mischief" of conflicting state and federal rulings could have been avoided if the *Younger* v. *Harris*, 401 U.S. 37 (1971), abstention doctrine had been applied); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 731 (1996) ("Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary."); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983) ("[A] stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata.").

"These federalism-based abstention and comity doctrines are complex and subtle, ensuring that a decision by a federal court to proceed, abstain, or stay in the face of parallel state court litigation will be made only after considering a number of case- and doctrine-specific factors." *Noel*, 341 F.3d, at 1160. Paralleling its attempt to distinguish an expansive version of *Rooker-Feldman* from congressionally mandated respect for state preclusion law, SABIC asserts that, in cases jurisdictionally barred under its expansive version of *Rooker-Feldman*, discretionary abstention or dismissal after careful balancing of important factors have no place. SABIC Br. 43. But, again, that assertion demonstrates precisely why adopting SABIC's expansive *Rooker-Feldman* approach would be inconsistent with the federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River*, 424 U.S., at 817. As with its argument in favor of circumventing state preclusion law, SABIC's grievance with the Court's existing abstention and prudential dismissal doctrines is essentially that they do not bar enough federal litigation. That argument does not provide any principled justification for expanding *Rooker-Feldman* to cover what SABIC regards as a deficiency in our Nation's dual jurisdictional structure.

II. This Case Is a Live Controversy Over the District Court's Jurisdiction.

Although the Delaware judgments on the merits likely preclude SABIC from evading their adverse consequences, it is well established that they do not render moot this proceeding to determine the district court's jurisdiction. *See Male* v. *Atchison, Topeka & Santa Fe Ry.*, 240 U.S. 97, 98-99

(1916); *accord Old Colony Trust Co.* v. *City of Seattle*, 271 U.S. 426, 429 (1926); *Ill. Cent. R. R. Co.* v. *Adams*, 180 U.S. 28, 31-32 (1901); *Cramer* v. *Phoenix Mut. Life Ins. Co.*, 91 F.2d 141, 144-45 (CA8 1937); *cf. Friedman's*, 290 F.3d, at 200 (Niemeyer, J., dissenting) ("[T]he majority's application of the doctrine of mootness is even more profoundly flawed than its application of the *Rooker-Feldman* doctrine.").[7]

Male directly answers any question about this Court's jurisdiction. As in this case, the issue before the Court in *Male* was "whether as a Federal court [the district court] had power to entertain the cause," and the respondent argued that an intervening state-court judgment on the merits rendered the appeal to this Court moot. *Male*, 240 U.S., at 98-99. *Male* overruled the respondent's motion to dismiss, explaining that "the ground of the motion obviously involves the defense of 'the thing adjudged,' going to the merits, . . . and we come to consider the question of the jurisdiction of the court below." *Id.*, at 99. Similarly, *Old Colony* rejected an argument that a state-court decree on the underlying claims mooted a jurisdictional appeal to this Court, explaining "[t]hat decree may have a bearing on the merits, but affords no ground for dismissing this appeal." 271 U.S., at 429; *see also Ill. Cent.*, 180 U.S., at 32-33; *Cramer*, 91 F.2d, at 144-45. The question before this Court—whether the federal district court has jurisdiction over ExxonMobil's claims—was never presented to or decided by any Delaware state court. Nor, of course, could it have been. As it did in

[7] As an initial matter, if SABIC's newly minted mootness theory were correct, it would require vacating the court of appeals's judgment because that court would have lacked appellate jurisdiction to determine the district court's jurisdiction. *See, e.g., Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992). Moreover, combining SABIC's theory that a federal case is necessarily mooted whenever a state trial court renders judgment on parallel claims with its theory that *Rooker-Feldman* necessarily bars a federal action in the precise same circumstance would, at the very least, render one theory superfluous.

Male and *Old Colony*, the Court should resolve the federal jurisdictional question at issue.

Moreover, even if the underlying dispute on the merits had any bearing on the vitality of this jurisdictional appeal, SABIC's own actions belie its assertions that the merits have now been resolved once and for all by the Delaware Supreme Court's affirmance. Within days of filing its supplemental brief asserting that the Delaware affirmance mooted the entire controversy, SABIC moved that court to withdraw its mandate and for reargument. On February 1, 2005, the Delaware Supreme Court in fact recalled the mandate to permit SABIC to pursue its motion for reargument. The possibility—however remote—that the Delaware Supreme Court will vacate its decision gives ExxonMobil an unquestionable concrete stake in resolution of the jurisdictional question that will determine ExxonMobil's right to pursue its claims in a new trial in a federal forum if the Delaware judgment should be rendered a nullity. *See North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (noting that a suit is cognizable in a federal court when it is "definite and concrete, touching the legal relations of parties having adverse legal interests").

Having lost the Delaware action it initiated, SABIC seeks to prevent the Court from reviewing the court of appeals's erroneous jurisdictional ruling because it presumably wants to avert the consequences of applying preclusion principles in the consolidated cases in the district court. In those consolidated proceedings, ExxonMobil has asserted that SABIC's claims in NJ-I are barred by affirmative defenses that include the issues already tried in Delaware. A reversal of the decision of the court of appeals is an effective remedy because it will permit the district court to appropriately address all preclusion issues together. In any event, these nonjurisdictional preclusion issues are very much alive and ought to be decided, in the first instance, by the district court.

CONCLUSION

For these reasons and those discussed more fully in ExxonMobil's opening brief, the Court should reverse the court of appeals's judgment and order ExxonMobil's claims to be reinstated.

Respectfully submitted,

ANDREW S. POLLIS
DAVID J. MICHALSKI
HAHN LOESER & PARKS LLP
3300 BP Tower
200 Public Square
Cleveland, Ohio 44114
(216) 621-0150

ELIZABETH J. SHER
PITNEY HARDIN LLP
200 Campus Drive
Florham Park, New Jersey 07932
(973) 966-6300

JAMES W. QUINN
DAVID LENDER
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-7000

GREGORY S. COLEMAN
Counsel of Record
CHRISTIAN J. WARD
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioners

Supreme Court, U.S.
FILED
JAN 18 2005
OFFICE OF THE CLERK

(6)

No. 03-1696

IN THE

Supreme Court of the United States

EXXONMOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC. AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,

Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CORRECTED SUPPLEMENTAL BRIEF OF RESPONDENT

KENNETH R. ADAMO
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

GREGORY A. CASTANIAS
(Counsel of Record)
LAWRENCE D. ROSENBERG
WILLIAM K. SHIREY II
JULIET JOHNSON KARASTELEV
ESTHER SLATER MCDONALD
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

CORRECTED SUPPLEMENTAL BRIEF OF RESPONDENT

Pursuant to this Court's Rule 25(5), Respondent Saudi Basic Industries Corporation ("SABIC") submits this corrected supplemental brief to advise this Court that on January 14, 2005, the Delaware Supreme Court issued its opinion in the "identical" Delaware state court proceeding. The opinion, which is attached as an addendum to this brief, affirmed the trial court's judgment awarding Petitioner ExxonMobil $416.8 million.

The Delaware Supreme Court's decision further confirms the arguments made by SABIC in its responding brief (filed on January 4, 2005): This identical federal action is moot (Resp. Br. 10-13) and, in all events, it is barred by the *Rooker-Feldman* doctrine (*id.*, 13-48). *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989).

This case remains moot because, even after the Delaware Supreme Court's decision, ExxonMobil has still received complete relief – its $416.8 million judgment remains intact. (Resp. Br. 10-13.) There is nothing left for the federal district court to do in this case because, as ExxonMobil's own lawyer has conceded, ExxonMobil "can only collect the $417 million once." (J.A. 34.) Indeed, ExxonMobil conceded in its filings to the Third Circuit that, under these circumstances, this case is now moot: "[I]f SABIC is unsuccessful on appeal in Delaware, the judgment in the Related Delaware Case . . . would be *res judicata*, rendering moot ExxonMobil's claims in NJ-II [*i.e.*, this suit]." (Resp. Br. Add. 4a.)

Furthermore, because this suit raises claims that have now been fully litigated through the Delaware court system, this suit remains barred under *Rooker-Feldman*. As SABIC demonstrated in its response brief (Resp. Br. 28-32), "a federal suit seeking to relitigate 'the very same' claims for

identical relief on the merits operates as an impermissible *de facto* appeal." (*Id.*, 28.) This is so even though ExxonMobil would (no doubt) advance in this federal suit "the same arguments that the state court[s] accepted," because SABIC "will necessarily challenge each of those arguments in the course of defending the federal action." (*Id.*, 30.) The district court proceeding, therefore, "will take the shape of a *de facto* appeal because the district court will, in essence, be reviewing the work already done" by the state trial court, and now affirmed by the Delaware Supreme Court. (*Id.*)

But as *Rooker-Feldman* makes clear, the only route for either party to pursue any aspect of the claims raised in this suit is not to the federal district court – which only exercises "original jurisdiction," *see, e.g.*, 28 U.S.C. §§ 1330, 1331, 1332, *et seq.* – but rather to this Court pursuant to 28 U.S.C. § 1257. And even though SABIC may pursue reargument in the Delaware Supreme Court, and direct review by this Court under § 1257, *Rooker-Feldman* nonetheless bars ExxonMobil from, in the meantime, maintaining this "insurance policy" suit in the district court below.

CONCLUSION

Accordingly, as SABIC urged in its response brief, this suit should either be dismissed as moot, or the court of appeals' decision dismissing it for lack of jurisdiction should be affirmed.

Respectfully submitted,

KENNETH R. ADAMO
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

GREGORY A. CASTANIAS
(Counsel of Record)
LAWRENCE D. ROSENBERG
WILLIAM K. SHIREY II
JULIET JOHNSON KARASTELEV
ESTHER SLATER MCDONALD
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent

January 25, 2005

ADDENDUM

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAUDI BASIC INDUSTRIES CORPORATION,	§	
	§	No. 493, 2003
	§	
Plaintiff Below,	§	
Appellant,	§	Court Below: Superior
	§	Court of the State of
v.	§	Delaware in and for
	§	New Castle County
MOBIL YANBU PETROCHEMICAL	§	
	§	C.A. No. 00C-07-161
COMPANY, INC. and	§	
EXXON CHEMICAL ARABIA,	§	
INC.,	§	
	§	
Defendants Below,	§	
Appellees.	§	

Submitted: June 1, 2004
Decided: January 14, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER** and **JACOBS**, Justices, and **STRINE**,[1] Vice chancellor, constituting the Court *en banc*.

Upon appeal from Superior Court. **AFFIRMED**.

A. Gilchrist Sparks (argued), Donald E. Reid and Jason A. Cincilla, Esquires, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; Of Counsel: Kenneth R. Adamo, Joseph L. McEntee, Jr. and Margaret I. Lyle, Esquires, of Jones Day, Dallas, Texas; Gregory A. Castanias, Lawrence

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[1] Sitting by designation pursuant to Art. IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4.

D. Rosenberg, Elizabeth Rees and William K. Shirey II, Esquires, of Jones Day, Washington, D.C.; for Appellant.

William J. Wade, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; Of Counsel: James W. Quinn (argued), David Lender and Gregory S. Coleman, Esquires, of Weil, Gotshal & Manges LLP, New York, New York; Andrew S. Pollis and David J. Michalski, Esquires, of Hahn Loeser & Parks LLP, Cleveland, Ohio; Elizabeth J. Sher, Esquire, of Pitney Harden LLP, Florham Park, New Jersey; Kenneth C. Johnson, Esquire of ExxonMobil Corporation, Houston, Texas; for Appellees.

JACOBS, Justice:

Saudi Basic Industries Corporation ("SABIC"), the counterclaim defendant below, appeals from a $416.8 million Superior Court judgment entered against SABIC and in favor of SABIC's joint venture partners, Mobil Yanbu Petroleum Company ("Mobil") and Exxon Chemical Arabia, Inc. ("Exxon").[2] SABIC brought this action in the Superior Court of Delaware, seeking a declaratory judgment that any payments made to SABIC by the joint venture partnerships were not overcharges that violated any applicable contract. In response, Mobil and Exxon asserted counterclaims in tort[3] and for breach of contract, alleging that for over two decades, SABIC had secretly overcharged the partnerships for technology that SABIC had licensed from Union Carbide Corporation. After a two-week trial, the jury found that

[2] Except where the context otherwise requires, Mobil and Exxon, the two counterclaim plaintiffs below, are referred to collectively as "ExxonMobil." Although Exxon's and Mobil's respective parents merged in 1999 to form ExxonMobil, they were separate companies and competitors at the time that most of the critical events in this lawsuit took place.

[3] As discussed more fully herein, ExxonMobil's tort claim was based upon the Saudi Arabian tort of *ghasb* (usurpation).

SABIC had breached the joint venture agreements and had also committed the Saudi tort of usurpation against both Mobil and Exxon. Based on those findings, the jury awarded compensatory damages of $220,238,108 to Mobil and $196,642,656 to Exxon.

On this appeal, SABIC contends that the judgment should be reversed and/or that the case should be remanded for a new trial, because the trial judge made numerous rulings, both substantive and evidentiary, that were erroneous as a matter of law. Having considered in depth the parties' briefs and the extensive record, we conclude that none of SABIC's multitudinous claims of error has merit and that the judgment of the Superior Court should be affirmed.

FACTS

The facts that are pertinent to this appeal are either undisputed or, where disputed, are based upon reasonable inferences the record evidence that, viewed in the light most favorable to the prevailing parties, raise issues of material fact that the jury could justifiably have resolved in ExxonMobil's favor.[4]

[4] The facts recited in this Opinion are shaped by the applicable standard of review. SABIC claims on appeal, among other things, that the trial court erroneously denied SABIC's motion for judgment as a matter of law. This Court reviews the denial of such a motion to "'whether the evidence and all reasonable inferences that can be drawn therefrom, taken in a light most favorable to the non-moving party, raise an issue of material fact for consideration by the jury.' In other words, we will not disturb a Superior Court ruling denying a motion for judgment as a matter of law where 'under any reasonable view of the evidence the jury could have justifiably found for [the non-moving party].'" *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998) (internal citations omitted); *accord, Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1036 (Del. 2003).

1. Formation of the Joint Venture Partnerships

SABIC is a Saudi American corporation that originally was 100% owned (and now is 70% owned) by the Saudi government. SABIC was formed in the late 1970s to work jointly with several firms to use petroleum-based feedstocks in manufacturing polyethelene, which is a type of plastic. During the mid-to-late 1970s, in order to diversify Saudi Arabia's industrial base, SABIC began exploring the possibility of forming joint ventures to manufacture polyethylene. The result was the formation of two separate 50-50 joint ventures, one between SABIC and Mobil (the "Yanpet joint venture"), and the other between SABIC and Exxon (the "Kemya joint venture"). The Yanpet joint venture was formed by an agreement SABIC and Mobil entered into on April 19, 1980; the agreement for the Kemya joint venture was entered into between SABIC and Exxon on April 26, 1980. Both joint ventures had the same ultimate purpose: to manufacture polyethelene in Saudi Arabia.

A critical, carefully negotiated premise of both joint ventures was that the profits enjoyed by each joint venture partner would be limited to the profits earned by the joint venture. As a result, no partner would profit at the joint venture's expense. Consistent with that principle, the joint venture agreements forbade any partner from charging a "mark-up" on technology procured from a third party and sublicensed to the joint venture. Thus, Article 6.3 of the Yanpet joint venture agreement provided:

> To the extent either Partner or any Affiliate thereof procures patents, processes and other licensing rights of third parties, and sublicenses such rights to the partnership, it shall not receive any remuneration other than actual cost incurred in acquiring and sublicensing such right.

And, Article 6.3 of the Kemya joint venture agreement, which was to the same effect, provided that:

> Patents, processes, and other licensing rights of third parties which require the payment of royalties, rentals and other remuneration to such third parties shall be paid by the Partnership against appropriate invoices. To the extent either Partner or any Affiliate thereof procure such rights and sublicenses for the Partnership, it shall not receive any remuneration other than actual cost disbursed in acquiring such license.

2. SABIC Secretly Overcharges The Yanpet And Kemya Joint Ventures

In order to manufacture polyethylene, Yanpet (the SABIC/Mobil venture partnership) needed technology that it did not own. Initially, the parties intended that Yanpet would license Unipol® PE technology directly from Union Carbide Corporation ("UCC"). After a Spring 1980 meeting in Riyadh, Saudi Arabia, however, SABIC informed its partner, Mobil, that SABIC itself would license the technology directly from UCC and then sublicense it to Yanpet. Consistent with Article 6.3, SABIC assured Mobil that SABIC would pass through to Yanpet at its cost, "dollar for dollar," the amounts SABIC paid to UCC for Yanpet's use of the Unipol® PE technology. In fact, however, SABIC intended to furnish the technology to Yanpet at a mark-up above SABIC's cost.

In September 1980, SABIC and UCC executed an agreement granting SABIC an exclusive license to the Unipol® PE technology within the Kingdom of Saudi Arabia (the "SABIC/UCC License Agreement"). Neither Mobil nor Yanpet was permitted to attend any of the meetings between SABIC and UCC at which the financial terms of the SABIC/UCC License Agreement were discussed. That did not concern Mobil, because having been assured that SABIC would be providing Yanpet the same terms that SABIC itself had procured from UCC, Mobil and Yanpet did not negotiate, or even comment upon, the financial terms of the sublicense. Ultimately, SABIC and Yanpet executed the

SABIC-Yanpet Unipol® PE Technology License Agreement, which was dated effective October 15, 1980.

Over the following two decades, SABIC charged Yanpet sublicense fees and royalties that were substantially higher than what SABIC was paying to UCC under the SABIC/UCC License Agreement.[5] Because SABIC never told Mobil that it had marked up the sublicense fees and royalties, Mobil believed, during that entire time, that SABIC's license royalties were being passed through to Yanpet at cost.

The negotiation of and performance under the sublicense agreement between SABIC and Kemya (the SABIC-Exxon joint venture partnership) mirrored the Mobil/Yanpet fact pattern. Originally, SABIC and Exxon planned for Kemya to use Exxon's own proprietary technology to manufacture polyethylene. Later, they understood that instead, Exxon would acquire the right to use UCC's Unipol® PE technology, and would then grant a Unipol® PE license to Kemya, as sublicensee. Ultimately, however, as with Yanpet, SABIC informed Exxon, in a March 1980 meeting in Riyadh, that it (SABIC) would license that technology directly from UCC, and then sublicense the technology to Kemya. Like Mobil, Exxon was excluded from the negotiations over the financial terms of the SABIC/UCC license. That did not concern Exxon because Mr. Ibrahim Bin Salamah, SABIC's chief negotiator for the Kemya and Yanpet Joint Venture Agreements and also for the Kemya and Yanpet Unipol® PE/UCC technology sublicenses, assured Exxon's representative that SABIC was "not

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[5] There is evidence that SABIC's motive for the surreptitious overcharges was to create a "cushion" for itself in case the joint ventures failed. SABIC accounted for the mark-up in its own internal accounting documents as its "profit" or "net gain."

interested in profiting on the technology passed on to its [joint ventures]."

In fact, however, SABIC never intended to limit its royalty charges to Kemya to the amount(s) that SABIC would be paying to UCC. As with Yanpet, SABIC had determined to charge a marked-up royalty to Kemya. Following the same pattern that it employed with Yanpet, SABIC overcharged Kemya for its use of the Unipol® PE technology, to create a "cushion" in case the ventures failed. SABIC accounted for the overcharges as a "profit" in its internal financial records.

In June 1987, because of poor market conditions in the polyethylene business, UCC agreed to reduce the royalties due from its licensees, including SABIC. Correspondingly, the joint venture partners amended the Yanpet and Kemya sublicenses to reduce the royalties payable by the joint venture partnerships to SABIC. Unbeknownst to ExxonMobil, however, SABIC had negotiated for itself a royalty rate reduction that was significantly larger than the reduction SABIC had granted to the joint ventures. Exxon and Mobil representatives testified that SABIC never told Mobil, Yanpet, Exxon or Kemya that it had extracted a reduction in the cost of Unipol® PE technology that was much larger than the reduction SABIC had extended to Yanpet and Kemya. SABIC's concealment of the discrepancy between those royalty reductions—which had the effect of increasing SABIC's reserves—was intentional.

Not until the year 2000 did ExxonMobil discover the overcharge. That occurred as a result of a dispute between SABIC and the Saudi taxing authority relating to the royalties paid by SABIC to UCC under the SABIC/UCC Agreement. The Saudi taxing authority determined that those payments were taxable. That decision prompted SABIC to send letters to Kemya and Yanpet informing them of the tax dispute and demanding that the partnerships pay a share of the tax to SABIC. While attempting to determine

the accuracy of SABIC's indemnification demand, ExxonMobil discovered, for the first time,[6] that SABIC had overcharged the partnerships for furnishing the UCC's Unipol® PE technology.

3. The Procedural History Of The Litigation

To aid an understanding of the issues presented by SABIC's arguments, it is helpful first to summarize the procedural history of the litigation, including the trial court rulings that are challenged on this appeal.

a. The New Jersey Federal Action

The claims at issue first surfaced in litigation brought by SABIC against ExxonMobil in the United States District Court for the District of New Jersey. In that court, SABIC sought a declaratory judgment that ExxonMobil had used technology, previously developed for Kemya, to obtain

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6 In support of its argument that ExxonMobil had waived their overcharge claims and that, in any event, the claims were barred by the statute of limitations, SABIC points to testimony of Richard Todd, a Kemya secondee, speculating about a possible difference between the amounts paid by Kemya and amounts paid by SABIC. Todd conceded, however, that he had no actual evidence of any differential, that he did not know whether there was, in fact, any difference, and that he was unaware of any assurances by SABIC to Exxon and Kemya that there would be no mark-up.

In an effort to establish its defense of waiver or, alternatively, that ExxonMobil had been on inquiry notice of its claims for statute of limitations purposes, SABIC also cites two June 1994 form letters, sent separately by SABIC to Yanpet and Kemya, that inadvertently attached a June 10, 1994 statement from UCC to SABIC. There is no evidence that anyone at Mobil ever saw that document or that anyone at Yanpet ever told Mobil about it. Nor did Kemya know what the document meant, because the UCC document addressed several joint ventures and the numbers relating to each were different. When Kemya asked SABIC about the document, SABIC reassured Kemya that the sublicense was a pass-through and that there were no overcharges. As a result of, and in reliance upon, that representation, Exxon and Kemya made no further inquiry about this issue.

proprietary information (including patent and trade secrets) in violation of ExxonMobil's service agreement with Kemya. SABIC sought a declaratory judgment that Kemya owned the patents, and also sought an injunction directing ExxonMobil to transfer legal title to those patents to Kemya.[7]

ExxonMobil raised the defense of unclean hands against claim, contending that SABIC had wrongfully overcharged Kemya for the royalty payments at issue here.[8] During the discovery stage, SABIC agreed to a consent order that would have required SABIC to respond to discovery regarding the overcharge claims. But SABIC did not comply with that order. Instead, it filed the Delaware Superior Court action that is the subject of this appeal.[9]

b. The Delaware Superior Court Action

In its Superior Court action, SABIC sought a declaratory judgment that Kemya's and Yanpet's royalty payments to SABIC were not overcharges that violated any applicable contract. In response, ExxonMobil interposed counterclaims for damages, based upon SABIC's alleged breaches of the joint venture agreements, breaches of fiduciary duty and upon the implied duty of good faith, and the doctrines of

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7 *Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F.Supp. 378, 384 (D.N.J. 2002), *vacated in part and remanded in part*, 364 F.3d 102 (3rd Cir. 2004), *cert. granted*, 125 S.Ct. 310 (2004).

8 *Id.* Shortly after SABIC filed the Superior Court action, ExxonMobil filed a separate action against SABIC in the New Jersey federal court to recover the royalty overcharges. SABIC moved to dismiss that second action, claiming that, as a "foreign state," it was immunized from being sued in the United States under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* ("FSIA"). The New Jersey District Court held that by filing suit in New Jersey, SABIC had waived any FSIA immunity as to the overcharge claims. *See* 194 F.Supp.2d at 401, 403.

9 *Id.*, 194 F.Supp.2d at 413-414, n.15.

unjust enrichment and promissory estoppel. ExxonMobil also demanded a jury trial, to which SABIC made no objection until only weeks before the trial, when SABIC moved (unsuccessfully) to strike the jury trial demand.

On March 21, 2003, at the conclusion of a two week trial, the jury returned a verdict awarding compensatory damages of $220,238,108 to Mobil and $196,642,656 to Exxon. The jury found that SABIC had breached Article 6.3 of both the Yanpet and Kemya joint venture agreements, and also that SABIC had committed the Saudi tort of usurpation ("*ghasb*")against both Mobil and Exxon.

SABIC claims on this appeal that that jury verdict must be set aside because it was the product of multitudinous rulings, all erroneous as a matter of law, made by the trial judge during the course of the Superior Court action. The rulings that are contested on this appeal fall into five separate groupings. To better understand SABIC's claims on appeal, and our analysis of those claims, the contested rulings are briefly summarized at this point.

(1) The Statute of Limitations Rulings

Before trial, SABIC moved for summary judgment on the ground that ExxonMobil's claims were barred by Delaware's three-year statute of limitations. The trial court denied that motion, holding as a matter of law that (1) under substantive principles of Saudi law (which both sides agree is applicable), ExxonMobil's claims were property rights that could not be barred by the passage of time; and (2) Delaware's borrowing statute (which would have subjected ExxonMobil's claims to the three year limitations period) was inapplicable.[10] The trial court later denied SABIC's post-trial motion for judgment as a matter of law or,

[10] Bench Ruling, C.A. No. 000-07-1 61, Feb. 10, 2003 (Appellant's Opening Br. at R4-8).

alternatively, for a new trial, holding that the court had previously determined, as a matter of law, that the Delaware three year statute of limitations did not bar ExxonMobil's claims.[11]

(2) The Evidentiary Rulings

Both before and during the trial, the Superior Court made rulings. Four of those rulings are contested on this appeal and are next described.

(a) the exclusion of certain testimony by Ibrahim Bin Salamah—proffered by SABIC long after the discovery cutoff date and shortly before trial—that contradicted the prior testimony of Bin Salamah and of another SABIC witness, as well as SABIC's formal admissions that SABIC intended to charge a marked-up royalty to Yanpet and Kemya but never disclosed that intent to its partners;

(b) the admission of an internal memorandum authored by Exxon employee, John Webb, reflecting representations by Mr. Bin Salamah in 1986, that the royalty rates paid by SABIC to UCC for its Unipol® PE license were the same as the royalty rates being paid by ExxonMobil as sublicensees of SABIC;

(c) the admission of testimony of Exxon employee George Fitzpatrick, and of Mobil employee Robert Murphy, that SABIC had promised ExxonMobil a "pass through" license, and later represented that it (SABIC) had "passed through" its billings to Kemya and Yanpet at SABIC's cost; and

(d) the limitation of the scope of evidence (proffered by SABIC) of Exxon's subjective intent relating to drafts of agreements that predated the joint venture, and that were

[11] *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. et al.*, C.A. No. 000-07-161, 2003 WL 22016813 (Del. Super. Aug. 26, 2003).

never executed, in connection with ExxonMobil's possibly providing polyethene technology to the joint ventures.[12]

(3) The Rulings On SABIC's Defense of Release

One of SABIC's defenses to ExxonMobil's counterclaims was that the 1987 Letter Agreements, wherein ExxonMobil and SABIC renegotiated the joint ventures license fees, operated to release all payment-related claims that ExxonMobil could have brought against SABIC. The trial court granted judgment as a matter of law to ExxonMobil on that release defense on three separate grounds: (i) neither Exxon nor Mobil had signed the 1987 Letter Agreements; (ii) the unambiguous language of those Agreements limited the scope of any release to technology-related claims and did not include payment-related claims; and (iii) the only evidence as to the relevant Saudi law was the unrebutted testimony of Professor Wael B. Hallaq, who opined that the 1987 Letter Agreements would not affect ExxonMobil's claims as a matter of law. After the jury verdict, SABIC renewed its motion for judgment as a matter of law, based on the same release defense that the trial judge had previously rejected. The Superior Court denied that motion by order dated August 27, 2003.[13]

(4) The Rulings on ExxonMobil's Claims For Breach of Contract

At the conclusion of the trial, the jury found that SABIC was liable to ExxonMobil for having breached Article 6.3 of the joint venture agreements, which (the jury found) was controlling and required SABIC to limit its royalty charges for providing Unipol® PE technology to the partnerships to a

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[12] *Saudi Basic Indus. Corp.*, 2003 WL 22048238 at *2-*5, *8-*9 (Del. Super. Sept. 2, 2003).

[13] *Saudi Basic Indus. Corp.*, 2003 WL 22048236 at *5 (Del. Super. Aug. 27, 2003).

"pass through" of SABIC's own cost of licensing that same technology from UCC. After the close of the evidence, SABIC moved for judgment as a matter of law on those contract claims. The trial court denied that motion.

After the jury verdict, SABIC renewed its motion for judgment as a matter of law or, alternatively, a new trial.[14] The basis of the renewed motion for judgment was that as a matter of law no reasonable jury could have found for ExxonMobil on their contract claims. The thrust of SABIC's alternative motion for a new trial was that the great weight of the evidence established that the 1980 Unipol® PE licenses had superseded and/or modified the joint venture agreements.[15]

The trial court denied both motions, holding that: (a) a reasonable jury could have found that Article 6.3 (which required a cost pass through) governed the terms under which SABIC could sublicense the Unipol® PE technology to the joint ventures; and (b) the record dispositively negated SABIC's contention that specific joint venture polyethylene licenses entered into in October and November 1980 had superseded or "trumped" Article 6.3 of the joint venture agreements, because Exxon and Mobil did not sign the sublicenses, and did not understand or intend that the sublicenses would operate to supersede Article 6.3.[16]

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[14] *Saudi Basic Indus. Corp.*, 2003 WL 22048236 (Del. Super. Aug. 27, 2003).

[15] *Id.* at *1.

[16] SABIC's defense that Article 6.3 was superseded by the sublicenses was stricken by the Superior Court. On appeal, SABIC contends that it is entitled, at the very least, to a new trial at which that defense could be presented to the jury.

The Superior Court also rejected SABIC's contention that ExxonMobil had abandoned their contract claims, concluding that "this particular argument borders on frivolous and [that]...the record establishes,

(5) The Rulings on ExxonMobil's Tort Claims for "Usurpation"

The jury also found SABIC liable to ExxonMobil for committing the tort known under Saudi law as usurpation (*ghasb*). The amount of the jury award for usurpation was $416 million, of which $92 million represented Exxon's and Mobil's pro rata share of the amounts that (the jury found) SABIC had overcharged for the Unipol® PE technology, and $324 million represented those parties' *pro rata* share of the profits that SABIC had earned through its use of the overcharges in its business operations.

Following the jury verdict, SABIC filed two separate motions for judgment as a matter of law or, alternatively, a new trial or remittitur on ExxonMobil's *ghasb* claims. In its first motion, SABIC sought judgment as a matter of law, claiming that there was no legally sufficient evidentiary basis for a reasonable jury to find for ExxonMobil, and that the evidence overwhelmingly supported a verdict in SABIC's favor.[17] Specifically, SABIC argued that the *ghasb* verdict was deficient as a matter of law because (1) the trial court declined to instruct the jury that under Saudi law, for SABIC to commit *ghasb* it must have acted "forcefully and with the victim's knowledge" (as distinguished from usurpation by secrecy or stealth), and (2) here, SABIC had acted secretively and without the victims' knowledge.[18]

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unequivocally, that ExxonMobil asserted, and continued to vigorously assert, its breach of contract claim and never stopped litigating this claim." 2003 WL 22048236 at *1. SABIC has not appealed that ruling.

[17] *Saudi Basic Indus. Corp.*, 2003 WL 22016864 (Del. Super. Aug. 26, 2003).

[18] *Id.* at *2.

The Superior Court denied that motion, ruling that (a) the court's determination of the Saudi law elements of *ghasb* on which it based the jury instruction was the culmination of many months of study, research, discussion and extensive expert testimony on Saudi law, including a separate live hearing on the subject;[19] (b) the court's rejection of the elements of "knowledge" and "force" advocated by SABIC was "consistent with the classical Hanbali authorities that would be followed by a Saudi judge;"[20] and (c) the jury verdict was not against the great weight of the evidence and indeed, was amply supported by the evidence.[21]

In its second (renewed) motion for judgment as a matter of law or, alternatively, a new trial or remittitur, SABIC contended that the damages award of $324 million (which SABIC characterizes as "enhanced damages"),[22] was unprecedented under Saudi law and, therefore, the jury should not have been allowed to award damages above the actual $92 million overcharge. Alternatively, SABIC argued, it was entitled to a new trial wherein the jury would be given adequate instructions on enhanced damages, rather than being led to believe that an enhanced damage award

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[19] *Id.* at *1, *2.

[20] The court found that the expert whose testimony was offered to support SABIC's view of the law, was "more of an advocate than an objective scholar of Islamic law." *Id.* at *4.

[21] *Id.* at *5.

[22] SABIC characterizes the $324 million component of the $416 million award as "enhanced damages," but at trial the Saudi law experts agreed that under Saudi law the injured plaintiff is entitled to recover compensatory damages for usurpation, which may include a return of the actual overcharged amounts *plus* the actual past profits obtained from the wrongful use of the overcharged amounts. Although SABIC's use of the term "enhanced damages" is vaguely suggestive of punitive damages, SABIC's expert, Dr. Frank Vogel, conceded that damages awarded for the tort of usurpation are not akin to punitive or exemplary damages.

follows automatically once the elements of *ghasb* are established. Those instructions (SABIC urged) should include a list of six factors that a Saudi judge would consider, plus the admonition that "enhanced damages" are permitted only under the most "unusual or egregious of circumstances."[23]

The Superior Court denied SABIC's motion, finding that its jury instruction relating to *ghasb* damages was correct and that the *ghasb* damages award was not against the great weight of the evidence. Specifically, the trial judge ruled that: (a) SABIC's argument that damages for *ghasb* are virtually unprecedented and rarely awarded in the Saudi legal system, was unsubstantiated, unverifiable and irrelevant;[24] (b) the jury instruction properly left any award of usurpation damages to the jury's discretion; (c) the six factors on which SABIC argued that the Court should have instructed the jury had no foundation in Saudi law as determined after a studied analysis based upon the authoritative texts; and (d) instructing the jury on the factors advocated by SABIC would be misleading and, in some cases, would invite inappropriate speculation.[25]

c. Proceedings After The Filing of This Appeal

After it commenced this appeal, SABIC filed a motion in this Court to supplement the record to include what SABIC characterized as an "official statement of Saudi Arabian law issued by the Ministry of Justice of Saudi Arabia." That "official statement" had never been presented to, or considered by, the trial court whose determinations of Saudi law had become final, subject only to review by this Court.

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[23] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 at *1, *2 (Del. Super. Aug. 26, 2003).

[24] *Id.* at *3.

[25] *Id.* at *2.

SABIC's motion was also filed without leave of this Court. ExxonMobil vigorously opposed the motion. Weeks later, SABIC filed a motion to remand the case to the trial court to reconsider certain of SABIC's post trial motions for judgment as a matter of law, or alternatively for a new trial, in light of its newly-filed "official statement of Saudi law." This Court denied both motions as procedurally improper on January 29, 2004.

ANALYSIS OF SABIC'S CLAIMS OF ERROR

(1) THE STATUTE OF LIMITATIONS RULINGS

(a) *The Issues Presented*

Before the trial, SABIC moved for summary judgment as a matter of law on the ground that the application of Delaware's borrowing statute[26] resulted in ExxonMobil's twenty-plus year old claims being barred by Delaware's three year statute of limitations, 10 *Del.* C. § 8106. SABIC claimed that Exxon and Mobil had inquiry notice of their overcharge claims no later than 1994, and that there was no legal basis to toll the running of the statute. More specifically, SABIC argued that: (i) because ExxonMobil's claim arose "outside of Delaware" (*i.e.*, in Saudi Arabia), the limitations periods prescribed by both Delaware and Saudi Arabian law were potentially applicable; (ii) Delaware's borrowing statute required the Superior Court to apply the shorter of those two potentially applicable limitations periods; (iii) in this case, the shorter period of limitations was the three year period prescribed by Section 8106, and as result, ExxonMobil's claims were time-barred.

In a pretrial bench ruling, the trial judge denied the motion, holding as a matter of law that the borrowing statute did not apply and that ExxonMobil's claims were not time-barred under substantive Saudi law principles. Under Saudi

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[26] 10 *Del.* C. § 8121.

law (which, all parties agree, governs ExxonMobil's contract and tort claims), property rights (including ExxonMobil's claims) are eternal and cannot be extinguished by the passage of time. As the trial judge explained:

> The Delaware borrowing statute, the purpose of it, is (a) to prevent forum shopping; and[ ] (b) [ ] to protect the residents of Delaware.
>
> To apply the borrowing statute and [conclude] that Delaware's state of limitation[s] would apply would basically turn the borrowing statute on its head for the purpose for which it was enacted.
>
> SABIC purposefully chose this forum. And all indications strongly suggest that they chose this forum to obtain a shorter statute of limitations. So it [is] somewhat of a twist; in that, usually these cases involve a plaintiff who chooses this forum, hoping to get a longer statute of limitations.... So here, it's a twist on the normal set of facts. But the bottom line is: Our legislature intended to prevent people out of state, foreign plaintiffs, from coming into this forum and getting the benefit of a statute of limitations that really ought not to apply given the fact that the substantive law is interwoven with the procedural right.
>
> And here because Saudi law makes it clear and the parties don't dispute that Saudi law makes it clear, that a property right is eternal. And there is no concept in Saudi law that the usurper of the property can rely on the passage of time to extinguish claims.

On that basis, the trial court ruled that ExxonMobil's claims were not barred as a matter of law. That ruling, SABIC contends, is erroneous because: (1) the Delaware borrowing statute does apply and as a result, makes applicable the shorter (three year) Delaware statute of limitations, which bars ExxonMobil's claims; (2) the three-year statute was not tolled or, alternatively, any tolling had ceased by 1994; and (3) even payments made by

ExxonMobil within the three-year limitations period (*i.e.*, after 1997) are not recoverable because they represented continuing damages, as opposed to continuing wrongs.

SABIC's contentions frame the limitations-related issues, which are *first*, whether Delaware's borrowing statute applies; *second*, if so, whether the Delaware three year statute of limitations was tolled and if so, for how long; and *third*, whether post-1997 royalty payments made within the three year limitations period are also time-barred. We review these claims *de novo* for errors of law.[27] For the reasons next discussed, we uphold the trial judge's determination that the Delaware borrowing statute (and, as a consequence the Delaware three year statute of limitations) does not apply. We further conclude that, independent of the borrowing statute, the Delaware tolling statute tolled any limitations period until SABIC commenced this action in July 2000, because before that time SABIC was not amenable to suit in Delaware and, therefore, was "out of the State" for tolling statute purposes.

(b) *Applicability of The Borrowing Statute*

It is undisputed that if Saudi law governs the limitations issue, then ExxonMobil's claims are not subject to any bar of limitations; but if Delaware law governs the limitations question, then the three-year statute applies and (absent tolling) bars ExxonMobil's claims.[28] The issue of which law applies turns upon whether the Delaware borrowing statute is applicable. That statute provides:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce

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[27] *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191 (Del. 1993); *Chrysler Corp. (Del.)*, 822 A.2d at 1031, 1035.

[28] Given our disposition of this issue, we do not reach contention that the post-1997 royalty payments would not be recoverable.

> such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.[29]

This statute, if literally read and applied, would cause the three-year Delaware limitations statute to govern ExxonMobil's overcharge claim. SABIC urges us to adopt such a literal reading. SABIC argues that under the first sentence of Section 8121, ExxonMobil's cause of action arose "outside of this State," *i.e.*, in Saudi Arabia. Therefore, the applicable limitations period must be prescribed by Delaware law, which is the "shorter" of the "time limited by the law of this State" (Delaware: three years) and "the time limited by the law of the...country where the cause of action arose" (Saudi Arabia: no limitations period). Moreover, SABIC argues, the application of Delaware's three year statute is similarly mandated by its second sentence, because the two joint venture partnerships were "resident[s] of this State" at the time the "cause of action originally accrued."

The infirmity in SABIC's argument is that its literal construction of the borrowing statute, if adopted, would subvert the statute's underlying purpose. Our case law precedent eschews such a construction. As both this Court and the trial court have recognized, borrowing statutes "are designed to prevent shopping for the most favorable forum...."[30] To accomplish that purpose, those statutes are normally designed to "shorten the time limit—not to extend

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[29] 10 *Del. C.* § 8121.

[30] *Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 58 (Del. 1957).

it."[31] Borrowing statutes such as Section 8121 are typically designed to address a specific kind of forum shopping scenario—cases where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations. Under that "standard scenario," the borrowing statute operates to prevent the plaintiff from circumventing the shorter limitations period mandated by the jurisdiction where the cause of action arose.

Our decision in *Pack v. Beech Aircraft Corporation* illuminates that purpose. In *Pack*, the plaintiff brought a wrongful death action in a Delaware court under the New Jersey Wrongful Death Statute, which had a "built in" two-year statute of limitations. Had the lawsuit been brought in New Jersey it would have been time-barred, because the suit was not filed until after the two-year limitations period had expired. The plaintiff argued that the action was not time-barred, because the applicable statute was not the New Jersey statute but the Delaware three-year statute of limitations. Rejecting that argument, this Court held that Delaware's borrowing statute would be applied in order to enforce New Jersey's "built in" two-year limitations period:

> If a non-resident chooses to bring a foreign cause of action into Delaware for enforcement, he must bring the foreign statute of limitations along with him if the foreign statute prescribes a shorter time than the domestic statute. Our statute does not apply to a resident of this State suing on a foreign cause of action provided he was a resident when

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[31] *Id.*, *citing* 63 Harv. L. Rev. 1177, 1263 *Developments in the Law: Statutes of Limitation*, (1950) ("Borrowing statutes provide only a shorter time limit than the local period, which is still applicable to bar an action not barred by the borrowed foreign limitation.").

> the cause of action arose. As to such a resident the common law rule that the *lex fori* governs the matter of limitations of actions is left in full force.[32]

Although the plaintiff in *Pack* was a resident of Delaware, this Court recognized that a literal application of the second sentence of Delaware's borrowing statute to that particular plaintiff would extend, rather than shorten, the applicable limitations period. This Court declined to apply the borrowing statute in such a literal way, because to do so would undercut the overriding purpose of borrowing statutes, which is "to prevent shopping for the most favorable forum." Because the two-year limitations period was "built in" to New Jersey's statutory cause of action for wrongful death, this Court applied Delaware's borrowing statute so as to "enforce the New Jersey law as we find it."[33]

The sane reasoning that led this Court to eschew a literal application of the borrowing statute in *Pack*, requires us to uphold the reasoning of, and the result reached by, the trial court in this case. Here, ExxonMobil's claims arose under Saudi law, which imposes no time bar upon those claims. If ExxonMobil had prosecuted their overcharge claims in Saudi Arabia, their claims would not be time-barred. But ExxonMobil did not assert these claims in Saudi Arabia, or bring suit in Delaware as plaintiff to enforce those claims against SABIC. Rather, it was SABIC who came to Delaware to obtain an adjudication that (*inter alia*) Delaware's three year statute of limitations barred ExxonMobil's claims. Given the nature of SABIC's affirmative claim for declaratory relief, ExxonMobil was entitled to assert its overcharge causes of action as counterclaims for damages. In these circumstances, as the

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[32] *Pack*, 132 A.2d at 57.

[33] *Id.* at 60.

trial judge found, the party that was "shopping for the most favorable forum" was SABIC, not ExxonMobil.

The trial judge recognized that to apply the borrowing statute to would subvert the statute's fundamental purpose,[34] by enabling SABIC to prevail on a limitations defense that would never have been available to it had the overcharge claims been brought in the jurisdiction where the cause of action arose, *i.e.*, Saudi Arabia. Because the Superior Court properly ruled that the borrowing statute did not apply, it follows that that court also correctly held that ExxonMobil's counterclaims to recover the royalty overcharges were not barred.

(c) *The Application of The Tolling Statute*

The conclusion that ExxonMobil's counterclaims were not time-barred was correct for a second, independent reason. Even if the borrowing statute did apply and thereby triggered Delaware's three-year statute of limitations, Delaware's tolling statute stopped the running of the three-year statute until SABIC filed this action in Delaware and as a result, became amenable to service of process. Our tolling statute provides:

> If at the time when a cause of action accrues against any person, such person is out of the State, the action may be

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[34] The correctness of the trial court's construction of the borrowing statute is also supported by other Delaware precedent. In *Air Prod. & Chem, Inc. v. Lummus Co.*, 252 A.2d 543 (Del. 1969), the plaintiff (like SABIC here) filed a preemptive action in Superior Court seeking a declaratory judgment that the defendant's threatened contract claim was barred by Delaware's three-year statute of limitations. There, as here, the contract claim had no relationship with the forum state (Delaware), and arose under the law of Puerto Rico, whose period of limitations was fifteen years. This Court required the declaratory judgment plaintiff, as a condition to requiring the litigation to proceed in Delaware, to stipulate that the Delaware borrowing statute would not be asserted as a defense. *Id.* at 545.

> commenced, within the time limited therefor in this chapter, after such person comes into the State in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the State, the time of such person's absence until such person shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action.[35]

It is settled law that the purpose and effect of Section 8117 is to toll the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state and are not otherwise subject to service of process in the state.[36] In those circumstances, the statute of limitations is tolled until the defendant becomes amenable to service of process.[37]

Here, SABIC was "out of the state" and service of process upon SABIC could not have been accomplished in Delaware. Because SABIC lacked significant contacts with Delaware before it filed this lawsuit, the Delaware courts would have lacked personal jurisdiction over SABIC. Therefore, ExxonMobil could not have obtained personal jurisdiction over SABIC in Delaware. Only by voluntarily initiating this action in Delaware as plaintiff did SABIC "come[ ] into the State" and thereby become amenable to service of process.[38]

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[35] 10 *Del. C.* § 8117.

[36] *Hurwitch v. Adams*, 155 A.2d 591, 594 (Del. 1959).

[37] *Brossman v. FDIC*, 510 A.2d 471, 472-73 (Del. 1986) (statute of limitations tolled until the effective date of the Delaware long-arm statute because prior to that time the nonresident defendant was not amenable to service of process).

[38] Shortly after SABIC filed this action, ExxonMobil commenced an action in the New Jersey federal court, raising claims similar to its counterclaims here. SABIC immediately sought to dismiss that action, claiming that it was immune from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et. seq.* ("FSIA") and could not be sued anywhere in the United States. The United States District Court for the District of New Jersey held that SABIC's filing suit in New Jersey waived any FSIA immunity as to the overcharge claims in New Jersey and the Delaware courts. *Saudi Basic Indus. Corp.*, 194 F.Supp.2d at 401-03, *vacated in part and remanded on other grounds*, 364 F.3d 102 (3rd Cir. 2004) (holding that the *Rooker-Feldman* doctrine deprived the federal court of subject matter jurisdiction over suit by ExxonMobil once final judgment on the identical issue was granted by the Delaware Superior Court.), *cert. granted*, 125 S.Ct. 310 (2004).

Thus, even if the three-year Delaware statute of limitations were found applicable to ExxonMobil's claims, the running of that statute was tolled until the date that SABIC filed its Superior Court action.[39]

We conclude, for these reasons, that the Superior Court did not err by rejecting SABIC's defense (and claim-in-chief) that ExxonMobil's counterclaims are barred by the statute of limitations.

(2) THE EVIDENTIARY RULINGS

We turn next to SABIC's claim that the trial judge made four erroneous evidentiary rulings. We review rulings on the admission of evidence for abuse of discretion.[40] Where a court "has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has

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[39] It is undisputed that ExxonMobil asserted their overcharge counterclaims well within the three-year period from the filing of SABIC's complaint.

[40] *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 590 (Del. 2000); *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

not been abused."[41] We conclude that none of the contested evidentiary rulings constituted an abuse of discretion.

(a) The first contested trial court ruling,[42] is the exclusion of SABIC's proffered testimony of Ibrahim Bin Salamah, the SABIC official who negotiated the joint venture agreements. The proffered testimony was that Mr. Bin Salamah had personally told his counterparts at Exxon and Mobil that SABIC would receive a margin or "mark-up" on the Unipol® PE technology. That testimony, if allowed, would have contradicted the testimony of SABIC's Rule 30(b)(6) representative, Dr. Richard Pai, whom ExxonMobil had deposed three times. On each of those occasions Dr. Pai testified that SABIC always intended to charge the joint ventures a margin on the Unipol® PE technology, but had never informed Exxon, Mobil, Kemya or Yanpet of its intent. The proposed new testimony would also have directly contradicted Ben Salamah's previous deposition testimony—given only days before trial—that SABIC "never talk[ed] about the margin;" as well as SABIC's October 4, 2002 interrogatory responses, filed shortly before the trial, that expressly adopted Dr. Pai's testimony. Lastly, the proffered new testimony would have contradicted SABIC's responses to ExxonMobil's requests for admissions, in which SABIC represented that it had "no information that shows, one way or the other" whether SABIC had disclosed the royalty mark-ups to the joint ventures or to ExxonMobil.

Granting ExxonMobil's motion *in limine*, the trial court prohibited Mr. Bin Salamah from giving his proffered new testimony, on two grounds. First, that testimony would reverse all of SABIC's prior positions on this issue; and

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[41] *Firestone Tire and Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

[42] That ruling was one of several bases of SABIC's motion for a new trial.

second, the reversal of position would be highly prejudicial. The proffered testimony was never disclosed to ExxonMobil until SABIC filed its reply brief in support of its motion for summary judgment—long after the discovery cut-off date and at a time that ExxonMobil was effectively foreclosed from countering the new testimony. The persons to whom Mr. Bin Salamah had supposedly revealed this information were not available either to be re-deposed or to be called as rebuttal witnesses at trial. By that point in time, one of those witnesses had died and the other (who was never questioned about this subject at his deposition) was unavailable to testify at trial. Not surprisingly, the trial judge ruled that:

> [I]t was SABIC's conduct during discovery that resulted in exclusion of this testimony. Simply stated, had SABIC complied in good faith with the letter and spirit of our discovery rules before trial, the Court would probably not have been forced to exclude this portion of Mr. Bin Salamah's testimony.[43]

The trial court reasoned that Mr. Bin Salamah's new testimony was reasonably available to SABIC at all times during the discovery period; that Rule 30(b)(6) required SABIC's counsel to review that testimony with Mr. Bin Salamah before submitting the (contrary) Rule 30(b)(6) deposition testimony of Dr. Pai (as the spokesperson for the SABIC organization); and that the consequences of counsel's failure to do that should fall upon SABIC, not ExxonMobil.[44] On the basis of "fundamental fairness,"[45] the trial court concluded that to have "allowed Mr. Bin Salamah to testify on this subject...would have rewarded SABIC for discovery

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[43] *Saudi Basic Indus. Corp.*, 2003 WL 22048238 at *3 (Del. Super. Sept. 2, 2003).

[44] *Id.* at *4-*5.

[45] *Id.* at *3.

techniques that do not pass muster in this Court and would have resulted in a thorough sandbagging of ExxonMobil."[46]

We agree. Given these facts, the trial court's evidentiary ruling could not possibly constitute an abuse of discretion. Mindful of that, SABIC attacks the ruling's factual and legal predicates. SABIC argues (contrary to the trial judge's finding) that Mr. Bin Salamah's new testimony would not have contradicted that of Dr. Pai, and that SABIC's counsel was not procedurally obligated to consult with Bin Salamah before Dr. Pai's Rule 30(b)(6) deposition. That argument amounts to little more than assertion without support in the record. Nowhere does SABIC come to grips with the case law that supports the trial judge's analysis and result. Having reviewed the record and applicable law, we conclude that the trial court's ruling is solidly grounded in both law and fact, and that SABIC's contrary arguments lack merit.

(b) The second contested evidentiary ruling was the admission into evidence of an internal memorandum by Exxon employee, John Webb, reflecting representations made by Mr. Bin Salamah in 1986, that the royalty rate called for by the SABIC/UCC license agreement for the Unipol® PE technology was identical to the royalty rate required by the SABIC-Kemya license agreement. SABIC claims that the Webb memorandum was admitted erroneously, because it was hearsay. The trial court, however, admitted the document as past recollection recorded, which is a recognized exception to the hearsay rule.[47] We find no abuse of discretion in the admission of that document. Nor was SABIC prejudiced by its admission into evidence. The trial court gave SABIC the opportunity to cross-examine Webb about the memorandum and also to call Mr. Bin Salamah and elicit his denial that he made any

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[46] *Id.* at *5.

[47] D.R.E. 803(5).

statement to Webb. SABIC availed itself of both opportunities.

(c) The third contested evidentiary ruling is the admission of the testimony of two ExxonMobil, employees, George Fitzpatrick and Robert Murphy, to the effect that SABIC had promised ExxonMobil a "pass through" license, and had represented (to Messrs. Fitzpatrick and Murphy) that SABIC had "passed through" its billings to Kemya and Yanpet at SABIC's cost. SABIC claims that this testimony was "multiple hearsay." That contention is misguided. A statement is not hearsay if offered only to prove that the statement was made, rather than for the truth of the matter asserted.[48] Here, Fitzpatrick's testimony about SABIC's statements was offered to rebut SABIC's defense that Exxon had waived its breach of contract claim, by showing that Exxon did not know about the overcharge and therefore could not have intentionally relinquished a known right. Nor could the out-of-court statement attributed to SABIC (that there was no overcharge) have been offered for its truth, because the truth was the precise opposite.

Mr. Murphy's disputed testimony was also to the effect that SABIC had promised a "pass through" license and that it had passed through its billings to Kemya and Yanpet at SABIC's cost. Murphy's testimony also was not hearsay because it was not offered for its truth. The statement was offered to correct a misimpression, created during Murphy's cross-examination, that Murphy had been told that SABIC intended to make a profit from furnishing the Unipol® PE technology, yet despite being so informed, ExxonMobil made no effort to follow up on that disclosure. Nor was the Murphy testimony prejudicial, because Murphy had previously testified that he received assurances from SABIC

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[48] D.R.E. 801(c); *Fawcett v. State*, 697 A.2d 385, 387 (Del. 1997).

that the UCC royalties would be passed through directly to Yanpet.

(d) The fourth contested evidentiary ruling concerns the limitation by the trial court of the scope of SABIC's proffered evidence of Exxon's subjective intent in connection with ExxonMobil's possibly providing polyethene technology to the joint ventures. SABIC attempted to prove Exxon's intent by offering into evidence drafts of never-executed agreements that predated the joint venture agreements. The trial judge excluded only the evidence and testimony that pertained to Exxon's internal state of mind, as distinguished from specific objective communications to and by SABIC on this subject (which were admitted). The trial court reasoned that Exxon's intent regarding never-executed agreements that predated the joint venture were not probative of Exxon's state of mind as of the later time when the parties did execute the joint venture agreements. This ruling was a rational exercise in determining the bounds of relevancy. Even more important, the ruling did not prejudice SABIC, which was permitted to introduce evidence of the earlier negotiations as of the time that (it appeared) Exxon and Mobil might provide the polyethylene technology to the joint ventures. Moreover, in closing argument SABIC's counsel was permitted to (and did) argue that SABIC believed that a royalty mark-up was acceptable, based upon the parties' early negotiations relating to the possible provision of the technology by Exxon and Mobil. The jury chose not to credit that argument, however.

For these reasons, none of the contested evidentiary rulings constituted an abuse of discretion.

(3) THE RULINGS ON SABIC'S RELEASE DEFENSE

SABIC's third claim of error is that the trial court improperly struck SABIC's release defense. SABIC argues that the 1987 Letter Agreements, wherein ExxonMobil and

SABIC renegotiated the joint ventures' license fees, operated to release all of ExxonMobil's payment-related claims against SABIC.[49] Because the court dismissed that defense as a matter of law, we review its ruling *de novo* for legal error.[50]

The trial judge ruled the release defense out of the case for three independent reasons. The first was that neither Exxon nor Mobil had signed the 1987 Letter Agreements; the second was that the plain language of those Agreements limited the scope of any release to technology-related claims and did not include payment-related claims; and the third was that the only evidence on this issue from a Saudi law expert was the unrebutted testimony of Professor Hallaq, who opined that the 1987 Letter Agreements would not affect ExxonMobil's claims as a matter of law. We conclude that the trial court ruled correctly in all respects.

Articles 18.2 and 19.2 of the joint venture agreements expressly require that any "amendment, modification, or waiver of any provision" must be "in writing and signed by the Partners." The term "Partners" is defined to mean SABIC and Exxon (in the Kemya Agreement) and SABIC and Mobil (in the Yanpet Agreement). Because Exxon and Mobil did not sign, and were not parties to, the 1987 Letter Agreements, they cannot be found to have waived claims under the joint venture agreements. The express requirement of a signature by the "Partners" in the joint venture agreement provisions, and the absence of any actual signatures by Mobil or Exxon, disposes of SABIC's contention that "the Exxon and Mobil partners [Kemya and

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[49] SABIC argues that the trial court erred by granting judgment as a matter of law on the release defense, and by denying SABIC's post-verdict motion for judgment as a matter of law on the basis of that same (previously stricken) defense of release.

[50] *Chrysler Corp. (Del.)*, 822 A.2d at 1031, 1035.

Yanpet] *are deemed* to have signed the agreements...because [they] were the joint venturers, and because they aceepted the lucrative benefits of those agreements."[51]

In addition, the scope of the release provisions in the 1987 Letter Agreements is clearly limited to "UCC LDPE Technology" and "UCC HDPE Technology." Both terms are limited in the sublicenses to "technical information and data." There is no evidence that the parties (SABIC, Kemya and Yanpet) intended a meaning different from that connoted by the agreement's plain language.[52] Furthermore, Professor Hallaq testified that under Saudi law, a release regarding the "object of the contract" (here, technology) cannot be construed as a release of claims relating to payment. That testimony is unrebutted.

Finally, as the trial court pointed out, Professor Hallaq, who was the only Saudi law expert who offered an opinion on the purported release, testified that even if the release language could be construed to cover claims for payment, under Saudi law the representations of Kemya and Yanpet in the 1987 Letter Agreements "are not binding and do not in any way preclude ExxonMobil's payment claims in this case." The reason (Hallaq testified) was that SABIC never disclosed that its royalty payments to UCC were less than

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[51] That argument lacks even facial coherence in the case of the 1987 Letter Agreement between Yanpet and SABIC, because that agreement was signed on behalf of Yanpet by SABIC's Bin Salamah, who knew—but concealed from Mobil—that SABIC had received from UCC a larger discount than it was passing on to the joint ventures.

[52] Freddie Merrell, who was president of Yanpet at the time, testified that he did not believe that Yanpet was releasing any payment-related claims in the 1987 Letter Agreement. Similarly, Gregory McPike, who was a member of the Kemya board at the time, testified that he did not believe the 1987 Letter Agreement had anything to do with releasing payment-related claims, and that he did not have authority to release a "$180 million claim" on behalf of Exxon.

Kemya's and Yanpet's royalty payments to SABIC. As a result, SABIC's representations in the 1987 Letter Agreements were "not accurate or complete." That testimony also stands unrebutted.

We conclude, for these reasons, that the trial court committed no error in dismissing SABIC's release defense as a matter of law.

(4) THE RULINGS ON EXXONMOBIL'S BREACH OF CONTRACT CLAIMS

By its verdict the jury found SABIC liable to ExxonMobil for having breached Article 6.3 of the joint venture agreements.[53] Those provisions (the jury determined) were controlling and limited SABIC's royalty charges for providing Unipol® PE technology to the partnerships, to a "pass through" of SABIC's own cost of obtaining a license for that same technology from UCC. During the trial, SABIC moved for judgment as a matter of law on ExxonMobil's contract claim, and after the adverse jury verdict, SABIC moved (again) for judgment as a matter of law or, alternatively, for a new trial. The trial judge denied both motions and judgment was ultimately entered against SABIC on the contract claims.

On appeal, SABIC contends that the trial judge erred in denying its pre (and post) verdict motions for judgment because: (1) as a matter of law Article 6.3 does not apply to SABIC's provision of the Unipol® PE technology to the joint venture partnerships; rather, the parties intended that Article 6.1—which does not require a cost "pass through"—would control; and (2) in any event, the joint venture agreements do not govern what royalties SABIC could charge for providing the Unipol® PE technology to the joint

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[53] Except where the context shows otherwise, the references (in the singular) to Article 6.3 and to Article 6.1, are to Articles 6.3 and 6.1 of both the Yanpet and the Kemya joint venture agreements.

venture partnerships. The reason (SABIC argues) is that the parties intended that the later-executed Unipol® PE/UCC technology sublicense agreements between SABIC and the joint venture partnerships—which have no "pass through" provision—would supersede and repeal any application of Article 6.3 of the joint venture agreements.[54]

To the extent SABIC claims that the trial court determined the applicable law incorrectly, or instructed the jury erroneously, or failed to grant judgment as a matter of law because of legally insufficient evidence, we review those claims *de novo* for legal error.[55] We will not disturb a jury's findings of fact on the basis of legally insufficient evidence, however, if there is "any competent evidence upon which the verdict could reasonably be based."[56] Having applied the appropriate review standards to the facts and evidence of record, we discern no error of law in the trial court's rulings, or any legal insufficiency of evidence to support the jury verdict, with respect to breach of contract claims.

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[54] Alternatively, SABIC contends that it is entitled to a new trial to allow SABIC to present to the jury the same contract defenses that were the subject of its motions for judgment as a matter of law. That contention lacks merit because SABIC was allowed to present those defenses to the jury, which chose not to accept them. 2003 22048236 at *3. Because we conclude that the trial court correctly rejected the contentions that underlie SABIC's motions for judgment, and that the jury's verdict (which was adverse to SABIC) is based upon competent and legally sufficient evidence, we do not further address SABIC's new trial argument.

[55] *Chrysler Corp. (Del.)*, 822 A.2d at 1034, 1036; *City Co. Liquidating Trust v. Cont'l. Cas. Co.*, 624 A.2d 1191, 1194 (Del. 1993).

[56] *Mercedes Benz of N. Am., Inc. v. Norman Gershman's Things to Wear*, 596 A.2d at 1358, 1362 (Del. 1991), (quoting *Turner v. Vineyard*, 80 A.2d 177, 179 (Del. 1951)).

(a) *SABIC's Argument That Article 6.3 Does Not Apply To ExxonMobil's Claims For Breach of Contract*

Our analysis of SABIC's first challenge to the judgment for breach of contract starts with the uncontested fact that when SABIC furnished the Unipol® PE technology to the joint venture partnerships, SABIC did not limit its royalty charges to the partnerships to a "pass through" of its own cost to procure that technology from UCC. It is undisputed that SABIC charged the partnerships a "mark up" over and above its actual cost. The record discloses substantial evidence (based upon which the jury found as fact) that SABIC had concealed those markups from ExxonMobil for almost two decades.

SABIC virtually concedes that those facts would constitute a violation of Article 6.3 of the joint venture agreements, *if* (as the jury found) Article 6.3 governs the overcharge breach of contract claims. SABIC can hardly contend otherwise, as Article 6.3 of the Yanpet agreement directs that "to the extent either Partner or any Affiliate thereof procures patents, processes, and other licensing rights of third parties, and sublicenses such rights to the Partnership, *it shall not receive any remuneration other than actual cost incurred in acquiring sublicensing such right.*"[57] Article 6.3 of the Kemya joint venture agreement is substantially identical. SABIC's position must therefore be (and indeed is) that Article 6.3 does not govern the overcharge claims. That position contains two prongs.

SABIC first argues, as it did in the Superior Court, that Article 6.3 does not apply to the Unipol® PE technology that SABIC licensed to the joint ventures. According to SABIC, Article 6.3, by its plain terms, applies only to partner-*licensed* polyethylene technology that is then sublicensed to

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[57] Yanpet Joint Venture Agreement, Art. 6.3 (italics added).

the joint ventures, as distinguished from partner-*owned* polyethylene technology that is then licensed to the joint venture. SABIC argues that the parties intended that Article 6.1(a)—which does not require a cost pass-through but instead allows the parties to negotiate transaction-specific financial terms—would apply to partner-owned polyethylene technology. Article 6.1, SABIC asserts, "plainly reflects the parties' intent that separate, later-executed technology [l]icenses, not the [joint venture] agreements, would exclusively govern the provision by a partner of the technology 'required' to 'manufacture' polyethylene." Because SABIC owned the Unipol® PE technology, Article 6.3 does not apply and therefore (SABIC concludes), no breach of Article 6.3 could legally have occurred.

The Superior Court rejected this argument on the ground that it ignores the plain language of Articles 6.3 and 6.1, as well as the substantial persuasive evidence that undermines SABIC's position. We conclude that the trial court ruled correctly. SABIC's entire position rests upon a distinction between partner-licensed and partner-owned polyethylene technology. Article 6.3, however, makes no such distinction. Article 6.3 does not exclude partner-*owned* polyethylene technology from its coverage. Indeed, that provision covers technology that a partner "procures," and as the trial judge held, "[a] reasonable jury could conclude that 'procures' includes a 'purchase.' In fact...a number of witnesses at trial...testified that 'procures, as it appears in Articles 6.3, would include a purchase of technology.'"[58]

SABIC's distinction does not aid its position for a second reason: a reasonable jury could have found that SABIC was a licensee, not the owner, of the Unipol® PE polyethylene technology. That technology SABIC then sublicensed to the

[58] *Saudi Basic Indus. Corp.*, 2003 WL 22048236 at *3.

partnerships—the very scenario that is contemplated and covered by Article 6.3. The trial court so held:

> SABIC's argument that it purchased the Unipol® PE technology and then licensed it to the Joint Ventures rings hollow in light of the great weight of evidence in the form of documents that refer to *sub* licenses.... The record is replete with documents referencing the UCC-SABIC transaction as a license and the SABIC Joint Venture transactions as sublicenses. SABIC's witnesses attempted to explain to the jury that while the term "sublicense" may have been used, SABIC "attached no legal meaning" to that term. The overwhelming documentary evidence supports the jury's finding that the true character of the UCC-SABIC agreement was a license, that the agreements with KEMYA and YANPET were sublicenses, and that Article 6.3 applied.[59]

SABIC next argues that the evidence conclusively establishes that the parties intended for Article 6.1 of the joint venture agreements (which contains no pass-through requirement)—not Article 6.3 (which does)—to govern the terms under which SABIC could sublicense the Unipol® PE technology to the joint venture partnerships. Only if the plain language of Article 6.1 is ignored can this argument attain plausibility, because in fact Article 6.1 fatally undercuts SABIC's claim.

Article 6.1(a) of the Kemya joint venture agreement provides that:

> To the extent patents and licensing rights and related technical proprietary information are in the opinion of the Partners required to design and construct the Petrochemical Plant and produce Manufactured Products, *ECAI* [Exxon Chemical Arabia Inc.] *and its affiliates* to

[59] *Id.* (internal footnotes omitted).

the extent they are permitted (without having to account to a third party) shall offer to provide to the Partnership, all such patents, licensing rights, technical and proprietary information necessary to perform its obligations hereunder consistent with Annex XI hereto.[60]

Article 6.1 explicitly and specifically refers to Exxon and Mobil, but that provision does not in any way mention, refer or even allude to SABIC. For that reason alone the jury had a reasonable basis to find that Article 6.1 does not apply to SABIC and, therefore, confers no rights upon SABIC.

On appeal SABIC argues—as it did before the trial court and the jury—that the references to "*ECAI and its affiliates*" in Article 6.1 of the Kemya joint venture agreement, and to "*MOBIL and/or MOBIL Affiliates*" in Article 6.1 of the Yanpet joint venture agreement,[61] must be construed to mean "*a partner*." Under that construction, SABIC would be an "affiliate" of Mobil or Exxon because those entities are partners in the two joint ventures.

That argument labors under multiple infirmities. Nothing in the joint venture agreements or in any case law cited by SABIC persuasively supports, let alone compels, that interpretation. To read "affiliates" as including all entities

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[60] Kemya Joint Venture Agreement, Art. 6.1 (italics added). Article 6.1 of the Yanpet joint venture agreement is substantially identical. It provides:

> To the extent patents and licensing rights and other technical and proprietary information which are owned or controlled by *Mobil and/or Mobil Affiliates* are required to design and construct the Petrochemical Complex and manufacture the Manufactured Products, *Mobil and its Affiliates* shall provide all such patents and licensing rights and other technical and proprietary information to the Partnership, necessary to perform its obligations hereunder on mutually agreeable terms and conditions.

Yanpet Joint Venture Agreement, Art. 6.1 (italics added).

[61] *See* note 60 *supra*.

with which Mobil and Exxon have formal relationships as partners—a construction that SABIC insists the jury was required to accept as a matter of law—would be odd, to say the least. SABIC was not an "affiliate" of Mobil or Exxon as that term is commonly and ordinarily understood.[62] To the contrary, SABIC was ExxonMobil's bargaining adversary, the party on the other side of the arm's-length negotiations that resulted in the joint venture agreements. Reuel Agarrado, SABIC's own witness, testified that Article 6.1 "does not apply to SABIC." There is no evidence that SABIC ever informed Exxon or Mobil that it was relying upon Article 6.1 when SABIC violated the pass-through terms of Article 6.3. Nor did SABIC ever allege in its original or amended complaint that it had relied upon Article 6.1.

Despite these infirmities, the trial court allowed SABIC to present its Article 6.1 argument to the jury, which ultimately rejected it. The jury's rejection of SABIC's argument has an ample and sufficient basis in the evidentiary record, as did the trial judge's post-trial ruling that the jury was justified in reaching that result:

> The Court notes that at trial ExxonMobil introduced a copy of [SABIC's] Second Amended Complaint...and Article 6.1 of the Joint Venture Agreements is nowhere mentioned in that complaint. The Court also notes that SABIC witnesses admitted that they never advised anyone at Exxon or Mobil that SABIC believed Article 6.1(a) applied to the provision of Unipol® PE technology to the Joint Ventures. Given all of this, there is more than a sufficient basis from which a reasonable jury could conclude that SABIC's Article 6.1(a) argument was an

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[62] For example, SABIC was not a parent, or a subsidiary, or a sister corporation, of Exxon or Mobil, or of any person or group that controlled Exxon or Mobil.

afterthought, and an unavailing one at that. This Court seriously considered precluding SABIC from presenting [that] argument...because of the lack of evidentiary basis supporting such an argument, and because the argument was not asserted until very late in [the] litigation.... After...characterizing SABIC's claim...as "hanging on by a thread," the Court nonetheless permitted SABIC to argue this to the jury over ExxonMobil's objection. Thus, SABIC had a full and fair opportunity to present this argument to the jury for its consideration. The jury rejected it .... [T]here is no basis to overturn the jury's rejection of that argument.[63]

We find that ruling to be free from error and correct.

(b) *SABIC's Argument That The Sublicenses Supersede And Repeal Any Application of Article 6.3*

Alternatively, SABIC contends that even if Article 6.3 does govern (thereby limiting SABIC's royalty charges to a pass through of its actual cost of obtaining the Unipol® PE technology), in this case Article 6.3 had no force or effect, because the SABIC/Kemya and SABIC/Yanpet sublicense agreements superseded and repealed any application of Article 6.3.

The trial court rejected this argument, holding that:

SABIC next argues that, under Saudi rules of contract interpretation, the Joint Venture polyethylene licenses which were entered into in November and October 1980 "trump" the general provisions of the Joint Venture Agreements, including Article 6.3. In support of this argument, SABIC states that under Saudi law, partnership agreements like the Joint Venture Agreements are *ja'iz* contracts, which are not prospectively binding on the

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[63] 2003 WL 22048236 at *3.

partners but rather serve as a starting point for later, transaction-specific agreements. The later transaction-specific contracts are *lazim* agreements which are prospectively binding on the partners and "trump" inconsistent terms of *ja'iz* contracts. According to this argument, the detailed transaction-specific nature of the Unipol® PE technology licenses makes them *lazim* contracts that supercede [sic] Article 6.3 of the Joint Venture Agreements. The infirmity of this argument is that there is no evidence in the record to suggest that Exxon or Mobil knew that SABIC was deriving a profit from its provision of the Unipol® PE technology to the Joint Ventures or that Exxon or Mobil knew the financial terms in the UCC-SABIC license. Thus, as a matter of law, the sublicenses cannot possibly modify Article 6.3 of the Joint Venture Agreements. In fact [on ExxonMobil's motion for judgment as a matter of law the Court pointed out that] on SABIC's contract modification argument, the parties' Saudi law experts agreed that...for there to be a modification of an agreement, the [parties] to the agreement must have conferred on the proposed modification and understood what they were agreeing to....

While the Saudi law experts who testified disagreed on many aspects of Saudi law, they did agree that it was not possible under Saudi law to modify an agreement unless the parties understood that they were modifying an agreement and understood the terms of the modification. There is no evidence in the record that Exxon or Mobil knew that the financial terms of the sublicenses were different than the UCC-SABIC license.... SABIC can point to no set of factual circumstances that suggest Exxon or Mobil understood, much less intended, that the sub-licenses modified Article 6.3. The Court also notes that Article 18.2 of the KEMYA Joint Venture Agreement and Article 19.2 of the YANPET Joint Venture Agreement specifically require that any amendment,

> modification or waiver of any provision of the Joint Venture Agreement be in writing and signed by the partners. Dr. Hallaq testified that these provisions would be honored under Islamic principles of contract law. Because Exxon and Mobil, the partners, never signed the sublicenses...the sublicenses cannot possibly supercede [sic] or modify the Joint Venture Agreements as a matter of Saudi law.[64]

The above-quoted analysis effectively disposes of SABIC's argument that the sublicense agreements modified and superseded Article 6.3 of the joint venture agreements. Nothing advanced by SABIC on this appeal straightforwardly addresses the trial court's reasoning. SABIC asserts that the trial judge misunderstood the significance of the *ja'iz* nature of the joint venture agreements, but that assertion ignores the testimony of SABIC's own Saudi law expert, Professor Frank E. Vogel, that even *ja'iz* partnership contracts remain binding on the partners unless and until the partners reach agreement on the changed terms. That event never occurred here. As Professor Hallaq explained, under Saudi law, the sublicense agreements cannot be deemed to supersede the obligations upon which the parties agreed in Article 6.3 of the joint venture agreements, because no language in the sublicense agreements purports to waive SABIC's obligations to ExxonMobil under those that provision. "This absence of waiver," Professor Hallaq explained, "is dictated by the Islamic legal principle that unspecific, general or implied language cannot supersede specific and clear language which Articles 6.3...represent.[65]

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[64] 2003 WL 22048236 at *4 (internal footnotes omitted).

[65] The expert testimony establishing the applicable principles of Saudi contract law vitiates SABIC's claim on appeal that the integration clauses of the sublicenses (which nowhere specifically purport to modify or supersede Article 6.3 of the joint venture agreements) must be regarded as "*conclusive evidence*" that the parties intended to supersede the prior joint venture agreements.

SABIC's remaining challenges to the trial court's breach of contract rulings are equally unavailing.[66] The evidence amply suffices to sustain the jury's finding that the joint venture agreements, and specifically Article 6.3, controlled ExxonMobil's contract claims and was not superseded by the sublicense agreements. No authority that SABIC presented either to the trial court or to us required the trial judge or the jury to accept SABIC's contrary position as a matter of law. Because the jury verdict finding SABIC liable for breaching Article 6.3 of the joint venture agreements was properly grounded both legally and factually, it must stand.

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[66] SABIC also assails the trial judge's determination that the sublicenses could not possibly modify or supersede the joint venture agreements because Mobil and Exxon did not sign the sublicense agreements. Exxon's and Mobil's actual signatures were not needed, SABIC argues, because the signature of SABIC—Exxon's and Mobil's partner in these joint ventures—was legally sufficient to bind Exxon and Mobil. This argument, like others advanced by SABIC, ignores the plain language of the governing contract. The joint venture agreements explicitly require that any amendment, modification or waiver of any provision of the joint venture agreements be "in writing and signed by the partners." The term "Partners" is defined in the Kemya agreement to mean SABIC and Exxon; and in the Yanpet agreement, is defined to mean SABIC and Mobil. SABIC's argument ignores the definition of "Partners," as well as the evidence provided by its own witness, Mr. Bin Salamah, who testified that when the partners intended to modify the joint venture agreement, they "sat down in a room and agreed in writing and signed it at the bottom of the page." It is undisputed that no authorized representative of Exxon and Mobil ever sat down in a room with SABIC and signed the sublicense agreements.

(5) THE RULINGS ON EXXONMOBIL'S CLAIMS OF USURPATION (*GHASB*)

SABIC reserves its final and most extensive set of challenges for the portion of the judgment holding SABIC liable to ExxonMobil for committing the tort known under Saudi law as "usurpation" or "*ghasb*." The amount of the jury award and judgment for usurpation was $416.8 million, which includes both the amount of overcharged royalties ($92.8 million) and the profits SABIC obtained from using those overcharges in its business ($324 million).

SABIC divides its challenges to the usurpation award into two separate categories of claimed error: (1) errors that resulted in SABIC being held liable for usurpation, and (2) errors that resulted in an award of what SABIC describes as "enhanced damages."[67] For both categories, SABIC argues that it is entitled to judgment as a matter of law on ExxonMobil's *ghasb* claims of liability and enhanced damages; or alternatively, to a new trial on both the liability and enhanced damages issues.

In support of its challenges SABIC advances five separate claims of error. First, SABIC contends that the trial court as a matter of law erred in denying its motion for judgment, because to be found liable for *ghasb* under Saudi law, ExxonMobil was required to—but did not—establish "an open and obvious taking that is intentional and without any

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[67] SABIC characterizes the latter component of the usurpation award (the profits earned from the overcharges) as "enhanced damages," to accentuate its argument that a disgorgement of profits is "unprecedented" and should not have been allowed in this case. ExxonMobil, on the other hand, characterizes the entire amount of the award as "compensatory damages," to underscore its position that past profits obtained by the tortfeasor's wrongful use of the overcharged amounts is an element of allowable damages for usurpation with "solid support" in the treatises of the Hanbali guild or school of Islamic law, the school that Saudi judges are instructed to follow.

color of right." SABIC argues that all ExxonMobil alleged and proved was that SABIC had engaged in "secret conduct...based upon color of right." Those contentions also form the basis for SABIC's second argument, which is that SABIC is entitled to a new trial on the issue of liability for *ghasb*, because the trial court erroneously declined to instruct the jury that the wrongdoer's actions must be "open, obvious, intentional and without color of right." Third, SABIC claims that it is entitled to judgment as a matter of law on the claim for enhanced damages, because no Saudi court would award enhanced damages in a contract case such as this one. Fourth, and alternatively, SABIC contends that it is entitled to a new trial in which the jury would be given adequate guidance in considering whether to award enhanced damages. Fifth, and finally, SABIC argues that the trial court, although purporting to employ the methodology that a Saudi judge would follow to determine the applicable Saudi law ("*ijtihad*"), in fact invoked *ijtihad* merely as a "*post hoc* rationalization" for foreign law rulings that were essentially arbitrary and unprincipled.[68]

To the extent SABIC contends that the Superior Court made incorrect determinations of Saudi law or instructed the jury incorrectly on issues governed by Saudi law, such determinations and jury instructions are treated as rulings on a question of law and are subject to *de novo* review.[69] But where, as here, the trial court's determination of foreign law rests on the credibility of foreign law experts, the trial court's

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[68] Appellant's Op. Br. at 40-41.

[69] SUPER. CT. CIV. R. 44.1; *see Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002) (trial court's jury instructions reviewed *de novo*); *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520 n.2 (Del. 2000) (foreign law determinations treated as rulings of law and reviewed *de novo*).

predicate credibility findings will be accorded appropriate deference.[70]

(a) *The Trial Court's Use of The Ijtihad Methodology To Determine Saudi Law*

We first address SABIC's fifth argument, because it challenges the methodology that the trial court employed to determine Saudi law, and, thus by its very nature, assails the procedural foundation of all of the challenged Saudi law rulings. In essence, SABIC claims that the *ijtihad* process that the trial judge employed to determine Saudi law was "free wheeling," "standardless," and a "bare 'guess' as to the correct content of Saudi law.[71] We reject these contentions, because the record clearly establishes that the trial judge went to extraordinary lengths to understand the applicable Saudi law and to make rulings that were consistent with the numerous Saudi law sources presented to her. To understand how and why that is so, a prefatory discussion of the Saudi system of jurisprudence, and of the Saudi *ijtihad* analytical approach, is helpful.

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[70] *See, BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 268 (3rd Cir. 2000) ("[T]he District Court is in the best position to determine what at this point is essentially a credibility issue—i.e., which [foreign law] expert to believe."); *Servicios Comerciales Andinos, S.A. v. Gen. Elec. Del Caribe, Inc.*, 145 F.3d 463, 476, n.7 (1st Cir. 1998) ("[T]he finder of fact is entitled to make its own assessment of the credibility of [foreign law] experts.").

[71] SABIC also asserts that *ijtihad* was "raised for the first time in post-trial briefing" and that "the court never indicated prior to its post-trial orders that it was engaging in *ijtihad* to determine either the elements of *ghash* or the availability of enhanced damages." *Id.* at 40. That assertion is contradicted by the record, which discloses that the trial judge questioned one of the expert witnesses about the *ijtihad* methodology during the Saudi law hearing, and that the judge indicated that she had relied upon that methodology in ruling upon a pre-trial motion for summary judgment.

In Saudi Arabia, Islamic law (*shari'a*), which is a fundamentally religious law based on both the *Q'uran* and the model behavior of the Prophet Muhammed, is the law of the land. Although early Islamic law scholars eventually coalesced into various guilds or schools, only four of those guilds have survived in modern times: the Hanbali, the Hanafi, the Shafi'i and the Maliki. In Saudi Arabia, the judges are instructed to rule exclusively in accordance with the teachings of the Hanbali guild.[72]

The Saudi law system differs in critically important respects from the system of legal thought employed by the common law countries, including the United States. Perhaps most significant is that Islamic law does not embrace the common-law system of binding precedent and *stare decisis*. Indeed, in Saudi Arabia, judicial decisions are not in themselves a source of law, and with minor exceptions, court decisions in Saudi Arabia are not published or even open to public inspection.

The trial judge was keenly mindful of this distinctive characteristic of Saudi law and of the problems that it created for defining the elements of, and remedies for, *ghash* and for how to instruct the jury on those issues. The court observed:

> SABIC's arguments ignore the simple truth that the circumstances under which *ghash* (usurpation) damages are available under Saudi law are not well known, much less defined, because Saudi law is not based on precedent or *stare decisis*. Contrary to the implication of SABIC's briefing on this issue, the reality is that one cannot simply consult a statute book or a case reporter to find the elements of, or damages available for, the Saudi law tort of *ghash*. Nor can one point to one definition of, or a given set of circumstances giving rise to, *ghash*. To

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[72] Dr. Vogel, SABIC's Saudi law expert, agreed that Saudi judges hew conservatively to the Hanbali school.

> illustrate the extreme difficulty of discerning and interpreting Saudi law, the Court notes that none of the Saudi law experts who testified agreed on the proper elements of *ghash*....
>
> Finally, because Saudi law decisions are not published, even *if* the decisions had precedential value (which all the experts agree they do not) the Court could not look to decisions of Saudi judges to determine the proper elements or define the recoverable damages.[73]

Instead of relying upon statutes or decisional precedent to discern the law applicable to a particular case, judges in Saudi Arabia must "first and last...navigate within the boundaries" of the Hanbali school's authoritative works, which are the scholarly treatises primarily consulted by Saudi judges.[74] Using these scholarly writings as guides, Saudi judges identify a "spectrum of possibilities on any given question, rather than a single 'correct' answer."

Thus, in this highly different legal environment, the predominate factor in determining the Saudi law on a given issue is the study and analysis, or *ijtihad*, that a judge brings to bear in each particular case. To state it in different terms, the critical inquiry is whether "the proper analytical procedures are followed in reaching the results." The trial judge so recognized, observing that "[w]hen faced with the daunting task of determining the elements of *ghasb* and the damages available for this tort, the Court, weighing the credibility of each Saudi law expert, exercised, as best it

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[73] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 (Del. Super. Aug. 26, 2003) at *1 (italics in original, internal footnotes omitted).

[74] Particularly important are two works by Mansur al-Bahuti, a 17th century scholar, as well as the works of Ibn Qudama and Al Maqdisi.

> could under the circumstances, *ijtihad*, to reach the 'right' result."[75]

Mindful of how "daunting" would be the task of determining the Saudi law principles applicable to this case, the trial judge made exceptional efforts to ensure that she was fully informed of the Hanbali teachings upon which to ground her legal rulings. Before trial, the parties presented the trial judge with seven reports from four Saudi law experts (two expert witnesses for each side), as well as each expert's lengthy deposition. Perceiving a conflict in the experts' opinions, the trial judge retained an independent expert, Mr. Herbert S. Wolfson, and obtained his advice on critical issues, including the elements of, and the damage remedies available for, usurpation. Mr. Wolfson prepared an initial report and the trial court permitted him to conduct additional research in Saudi Arabia, after which Wolfson prepared a supplemental report and was deposed for a full day. After reviewing a total of nine reports and over one thousand pages of deposition testimony, the trial judge then held a day-long pretrial hearing, to permit the parties to present live testimony from Professor Hallaq, Dr. Vogel and Mr. Wolfson. Only after this extensive process did the trial court undertake to determine the disputed elements of *ghasb*. Even after that comprehensive inquiry, the court considered (over ExxonMobil's objection) two additional reports of Dr. Vogel submitted *post-trial*.

It is notable that only after SABIC received the adverse jury verdict did it attack the trial court's *ijtihad* process, even going so far as to contend, in a post-trial affidavit of Dr. Vogel, that the trial judge "was simply not qualified to

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[75] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 at *2, n.8 (Del. Super. Aug. 26, 2003) (citing the testimony of Professor Hallaq that every time a Muslim judge exercises *ijtihad*, "it is basically his best...effort to find what is the right thing to do…" and the testimony of Herbert S. Wolfson that a Saudi judge performing *ijtihad* tries to do the "right thing.").

practice *ijtihad*." SABIC advances that same position on appeal. Confronting that contention, the trial judge made the following observations which, in our view, afford a complete answer to SABIC's position:

> What troubles the Court even more is that Dr. Vogel opines that this Court cannot credibly engage in the *ijtihad* process. According to Dr. Vogel, "*ijtihad* requires for its credibility qualifications which on the very face of things, neither Prof. Hallaq, myself or, with respect, any U.S. Court possesses." If Dr. Vogel is correct, then why did SABIC choose to file this dispute in a United States Court? If Dr. Vogel is correct in that neither he nor Dr. Hallaq possess the qualifications to engage in the *ijtihad* process, then *what* Saudi law "expert" would be able to assist this United States Court in determining the applicable Saudi law?
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> * * *
>
> It is remarkable that SABIC, having [purposefully] selected this forum instead of a Saudi Court, knowing the United States legal system is dramatically different than the Saudi legal system, comes forward after a verdict against it to claim that *no* American judge is qualified to interpret and apply Saudi law. This is particularly incredible in light of SABIC's vehement argument that this case should be tried by a U.S. judge.[76]

As we view it, the careful, painstaking inquiry that the trial judge conducted puts to rest SABIC's contention that she engaged in a standardless, "seat of the pants" determination of the disputed Saudi law issues. It is one thing for SABIC to argue that one or more specific decisions resulting from the trial judge's inquiry are legally erroneous.

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[76] *Saudi Basic Indus. Corp.*, 2003 WL 22016864 at *4 (Del. Super. Aug. 26, 2003) (italics in original, internal footnotes omitted).

On this record, however, it is not fair for SABIC to contend that the trial court's analytical process itself was arbitrary, unprincipled or lawless.

We turn next to the specific legal errors that SABIC claims the trial judge made in her *ghasb* liability and damages determinations and jury instructions.

(b) *The Claim That The Trial Court Determined The Legal Elements of Ghasb Erroneously*

After considering the extensive documentary and testimonial evidence of Islamic law pertaining to *ghasb*, the trial court determined that:

> In order to establish a claim for usurpation, Mobil or Exxon must show, by a preponderance of the evidence, that SABIC wrongfully exercised ownership or possessory rights over the property of another without consent, which means with blatant or reckless disregard for those property rights. The conduct need not be intentional.[77]

SABIC does not dispute that ExxonMobil factually established each of those elements. Rather, SABIC argues on appeal, as it did in the Superior Court, that the trial court's formulation of the tort of usurpation is erroneous because *ghasb* includes two additional elements that the trial court ignored: (1) SABIC's taking of the joint ventures' property must be "open and obvious," and (2) the taking must be "intentional and without any color of right." Thus, SABIC argues that it cannot be adjudicated as a usurper so long as its seizure of its partners' property was surreptitious, as distinguished from being open and obvious.

The trial judge rejected this argument on the ground that SABIC's two additional proffered elements find no support in the Hanbali works, as explicated by the Saudi law experts whose testimony she found to be credible. Having reviewed

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[77] *Id.* at *1.

the extensive record developed on this issue, we conclude that the trial judge's legal rulings, and the intermediate evidentiary and factual rulings upon which they are grounded, are correct.

Bearing importantly on this issue, as the trial judge found, is that "[as] Mr. Wolfson opined...there is no single binding definition of *ghasb*, 'but rather a range of possibilities.'" Dr. Vogel testified that...there is "no single 'binding definition of usurpation [or *ghasb*]."[78] Not surprisingly, all three experts "differed on the proper elements of a *ghasb* claim."[79] That being the case, the trial judge had no alternative but to decide which expert's testimony to accept or reject. The trial court determined to accept the opinion testimony of Professor Hallaq and Mr. Wolfson, and to reject that of Dr. Vogel. The court found:

> ExxonMobil points out that Dr. Vogel's "varying and inconsistent" definitions of *ghasb* only confirm that there is no one correct definition. The Court is inclined to agree. Each time he opined on the subject, Dr. Vogel's definition [of] *ghasb* seemed to change....
>
> The Court does not find Dr. Vogel's latest definition of *ghasb* persuasive. Having had the opportunity to watch Dr. Vogel testify, observe his demeanor on the witness stand when his interpretation of Saudi law was challenged, and review his latest affidavit as well as his prior affidavits and deposition testimony, the Court finds he has become (or been exposed as) more of an advocate than an objective scholar of Islamic law. His relentless attacks on Dr. Hallaq's qualifications and expertise further

[78] *Saudi Basic Indus. Corp.*, 2003 WL 22016864 at *4 (Del. Super. Aug. 26, 2003) (internal footnotes omitted).

[79] *Id.* at *3.

> undermine his credibility in the Court's eye. The Court is concerned about Dr. Vogel's objectivity.[80]

That finding is entitled to deference on appeal. Based upon the testimony of Mr. Wolfson, (and even, to some extent, of Dr. Vogel), the trial court determined that SABIC's first disputed element—an "open and obvious" taking—cannot be located in the works of the Hanbali school. As Mr. Wolfson noted, "the most influential Hanbali scholars, whose works enjoy tremendous respect in Saudi Arabia," do not "include openness or notoriety as elements in the definition of *ghasb*." Dr. Vogel also agreed that the Hanbali scholars do not include open and notorious in their definition of usurpation, and he conceded that even if the victim is completely unaware that a taking has occurred, the taking qualifies as usurpation:

> Q. Now suppose, just suppose, I have a bunch of horses, okay?.... And you come into my corral and take one of my horses, but I'm in Brazil.... So I have no idea that you have in fact taken my horses.... And, indeed, when I come back, I don't know that the horse is gone?.... That would be usurpation, too, wouldn't it?
>
> A. Yes.[81]

In short, the record supports the trial judge's foreign law determination that the Hanbali sources do not require that the wrongful exercise of ownership or possessory rights over the property of another must be "open and obvious." Nor do the Hanbali texts support SABIC's second argued-for element, that the taking must be "intentional." SABIC bases that argument upon the (rejected) testimony of Dr. Vogel, who

[80] *Id.* at *4 (footnotes omitted).

[81] Professor Hallaq explained that "[t]he victim doesn't have to know that he was violated in to be considered a victim of usurpation."

never identified any Hanbali source that supports a definition of usurpation which includes an element of intentional transgression. Mr. Wolfson, whose testimony the trial judge did accept in some important respects, opined that "the intent to infringe cannot possibly be a necessary element" of a civil claim for usurpation, based on numerous examples of usurpation in the authoritative texts that demonstrate that even an innocent purchaser of wrongfully taken property can be held liable. Although the usurper must "inten[d] to exercise ownership, he need not inten[d] to infringe the rights of the true owner." The trial judge's determination of Saudi law, based entirely on expert testimony, is entitled to deference, as no basis has been shown to overturn it.

Accordingly, we find that the trial court committed no error in submitting the usurpation claim to the jury or in denying SABIC's motion for judgment as a matter of law.

(c) *The Claim The Trial Court Instructed The Jury Erroneously On The Elements of Ghasb*

SABIC next argues that even if the trial court was correct in denying its motion for judgment as a matter of law, the court erred by not granting SABIC's alternative motion for a new trial. The basis for this argument is that the jury was not, but should have been, told that to find that SABIC committed usurpation, it must find that SABIC's conduct was "open, obvious, intentional, and without color of right." We have rejected that argument as the basis for SABIC's claim of entitlement to judgment as a matter of law. The argument fares no better when it is recast as a claim of entitlement to a new trial. Because we have upheld the trial court's determination that to constitute usurpation a wrongdoer's conduct need not be open, obvious, or intentional, it follows that the trial court committed no error

in refusing to instruct the jury on definitional components that were not elements of that tort under Saudi law.[82]

(d) *The Claim That The Trial Court Erroneously Permitted The Jury To Decide Whether To Award "Enhanced Damages" To ExxonMobil*

SABIC next contends that the trial court erred by denying its motion for judgment as a matter of law as to the portion of the jury verdict that awarded "enhanced damages" to ExxonMobil.[83] The ground for this claim is that "no Saudi court would award enhanced damages in a contract case such as this one," because "enhanced damages are unprecedented in contract cases, even where the elements of *ghasb* are otherwise present."

SABIC presented that same argument to the trial judge, who concluded that "SABIC's argument that damages for *ghasb* are rarely awarded in the Saudi legal system and are virtually unprecedented[,] is unsubstantiated, unverifiable and irrelevant...."[84] As the trial court explained:

> [S]imply because SABIC's expert is unable to name a case in which a Saudi judge awarded damages for usurpation is of little import to this Court considering that Saudi law does not recognize *stare decisis* and Saudi law opinions are not published. To say that usurpation damages are "highly unusual" presumes that there are

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[82] The trial court instructed the jury "that the tort of *ghasb* is comprised of the following elements: (a) the exercise of ownership or possessory rights, (b) over the property of another, (c) without consent, (d) wrongfully." *Saudi Basic Indus. Corp.*, 2003 WL 22016864 at *1 (Del. Super. Aug. 26, 2003).

[83] As previously noted, "enhanced damages" refers to $324 million of the total $416.8 damages award, which represents the profits realized by SABIC for using the overcharged amounts in its business.

[84] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 at *3 (Del. Super. Aug. 26, 2003).

> Saudi law cases where judges refuse to award damages for usurpation even when the elements have been clearly established. No such case law was provided to the Court, nor could it be, given the nuances of the Saudi law system. Moreover, whether a form of damages is "unprecedented" is also irrelevant if such damages are available according to the authoritative Hanbali texts which are the primary works consulted by Saudi judges to determine the law applicable to the type of dispute raised in this case.[85]

SABIC makes no effort to confront the trial judge's reasoning in its briefs. Instead SABIC strives to create the impression that all the Saudi law experts, including Mr. Wolfson, agreed that a Saudi judge would be unlikely to award so-called "enhanced damages" in a contract action. That argument, besides being legally irrelevant, is factually wrong. A claim for *ghasb* lies in tort, not in contract. Mr. Wolfson testified that compensatory damages for the tort of *ghasb*, which includes repayment of both the actual overcharged amounts and the actual past profits obtained by SABIC's use of those amounts in its business operations, finds solid support in the Hanbali treatises. Even Dr. Vogel acknowledged that "the Hanbalis have made a point of...trying to pursue that usurper for all conceivable profits."[86] Accordingly, no basis has been shown for SABIC's claim that the trial court committed legal error by submitting the "enhanced damages" issue to the jury.

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[85] *Id.* at *2. The trial judge further observed "[b]y way of analogy [that] under U.S. law, punitive damages are rarely awarded, yet we do not instruct the jury about the frequency or lack of frequency of such awards." *Id.*

[86] *Id.* at 0066.

(e) *The Claim That The Trial Court Instructed The Jury Erroneously On The Question of Enhanced Damages*

SABIC's final argument is that it is entitled to a new trial on enhanced damages, because the trial judge instructed the jury that it "may" award enhanced damages for *ghasb*, yet provided no guidance to cabin the jury's discretion in awarding such damages. That "total lack of guidance," SABIC urges, was not only "prejudicial and reversible error," but also a denial of due process of law, because the instruction granted "unfettered...discretion...without any consideration by the jury of the factors that would be taken into account by a Saudi Court."

Implicit in SABIC's position, but never straightforwardly argued to us or to the trial court, is the premise that this case should never have been tried to, or decided by, a jury. We address that implicit premise first. Had SABIC taken this position frontally and from the outset of the case, that argument might have considerable force. The reason is that in an American jury trial, the division of labor between judges and juries does not readily lend itself to the *ijtihad* methodology that Saudi Arabian jurists are required to employ. A jurist deciding a case under Saudi law would have wide discretion that, as the Superior Court found, differs significantly from that which is normally vested in an American jury. A Saudi jurist is empowered—although not legally required—to consider all equities that might bear on what, if any, damages the Saudi jurist, unconstrained by American rules of evidence,[87] might choose to award.[88]

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[87] For example, the Saudi jurist would not be constrained by D.R.E. 403, under which the trial judge in this case excluded evidence because its probative value was outweighed by its potential for prejudice.

[88] By way of example, as Mr. Wolfson testified, a Saudi adjudicator could (but would not be required to) take into account factors such as: (i)

To put it in different terms, had SABIC brought this case in Saudi Arabia, the litigation would have been not unlike a proceeding in equity before a jurist having capacious authority to make factual and legal determinations, including shaping a remedy in accordance with the jurist's sense of equity, circumscribed and influenced by the traditions of Islamic law that he would bring to bear on the dispute. In such a proceeding, the Saudi jurist would have had complete discretion to conclude that an award requiring SABIC to disgorge the profits it earned from the wrongfully retained overcharges was equitable. Unlike the division of labor inherent in an American jury trial, the Saudi jurist's application of *ijtihad*, and his resulting remedial decision, would not neatly divide between determinations of law and fact.

But, this case was not brought in Saudi Arabia. Instead, SABIC voluntarily brought this case in an American court of law, where SABIC knew there is a division of labor between the judge (whose duty is to determine the applicable law) and the jury (whose duty is to determine the facts). Nor did SABIC ever seek to avoid a jury trial at the outset of the case, which it could have done. Instead, SABIC waited until only a few weeks before the trial to file a motion to strike ExxonMobil's jury trial demand. Even then, the basis for SABIC's motion was not that a jury was inherently incapable of deciding Saudi law claims, but rather that the war in Iraq and the other events unfolding in the Middle East would prejudice the jury against SABIC. The trial judge denied that motion and SABIC's post-verdict motion for a new trial

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whether SABIC's conduct was intentionally harmful; (ii) whether, even if tortious, SABIC's conduct was not intended to deprive Yanpet or Kemya of their property; and (iii) whether any obligation SABIC had to restore any wrongful overcharges should be mitigated by the length of time ExxonMobil took to assert their claims.

(arguing the same ground). — The trial court ruled that ExxonMobil was constitutionally entitled to have a jury decide its counterclaims. Moreover, the court had taken extraordinary precautions to identify, and to afford SABIC an opportunity to strike, any potentially prejudiced jurors.[89] SABIC has not challenged that ruling on appeal.

Having chosen an American forum whose adjudicatory processes SABIC knew were different from those of Saudi Arabia, SABIC cannot fault the trial court for having followed those procedures. That is especially true where, as here, SABIC presented the trial judge very little by way of helpful proposed instructions, and where the instructions it did propose were reasonably found to be not well grounded in Saudi law. Having rationally taken into account the unusual (from a Saudi law standpoint) procedural posture in which she was functioning, and having grounded her instructions to the jury upon a well-reasoned distillation of the Saudi principles articulated by the foreign law expert whose testimony she was entitled to credit, the trial judge did all that could have fairly been expected.

Turning to the specifics of SABIC's claim, our review of a challenged jury instruction focuses "'not on whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty.'" Jury instructions "need not be perfect," but they "must give a correct statement of the substance of the law and must be 'reasonably informative and not misleading.'"[90] We conclude that the instruction given to the jury as to awardable *ghash* damages satisfies those standards. The jury was instructed as follows:

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[89] *Saudi Basic Indus. Corp.*, 2003 WL 22048238 (Del. Super.) at *1-*2.

[90] *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002) (quoting *Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000)).

> I will now explain to you an additional element of damages that you may award only if you find that SABIC is liable for usurpation, a claim I defined for you earlier.
>
> If you find in favor of Exxon or Mobil on the claims for usurpation, then you may award damages above the amount, if any, you awarded for breach of contract based upon any profits you may determine SABIC derived by using in its operation the money, if any, that was usurped from YANPET or KEMYA. Damages for usurpation may not include any interest.[91]

Any appellate determination of whether a jury was afforded sufficient guidance in exercising its fact-finding discretion on a given issue, must necessarily depend upon the law that governs that issue and the instruction that the trial court gave (or refused to give) on that subject. In this case, the only specific request SABIC made to the trial court to furnish such guidance, was that the court instruct the jury on six factors that Mr. Wolfson suggested might possibly enter into a Saudi judge's perception of the equities in this case.[92] The trial judge declined to give the requested instruction, for two reasons. The first was that the requested instruction did not represent established Saudi law; the

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[91] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 at *2 (Del. Super. Aug. 26, 2003).

[92] Those factors include: "(1) the court's perceptions as to the relative culpability of each party; (2) the lapse of time between the start of the alleged wrongful conduct and ExxonMobil's decision to file suit; (3) a desire to find the middle ground between competing litigants; (4) the sheer size of ExxonMobil's claim in terms of the absolute number of dollars at slake (and the attendant perception that awarding compensation above the principal amount might be 'too much'); (5) a desire to balance ExxonMobil's right to recover any wrongfully taken principal amounts with the possibility of undue hardship to SABIC and/or (6) a concern that ExxonMobil's decision to invoke the Islamic law tort of *ghasb* may have been motivated by a desire to sidestep the unavailability of interest or lost profits in Saudi Arabia and, thus, should not be rewarded."

second was that to give the requested instruction would likely confuse and mislead the jury. The trial court's analysis of these concerns, as reflected in her post-trial denial of SABIC's motion for judgment as a matter of law or, alternatively, a new trial on the damages issue, is thoroughly textured, well-reasoned, and, in our view, dispositive of SABIC's claim of error.

The trial judge's first reason for not instructing the jury on the six "Wolfson factors" was that they did not represent established Saudi law:

> It is important to place the six factors articulated by Mr. Wolfson in the proper context. It is clear from the context in which Mr. Wolfson offered this testimony that he was not stating that these factors were Saudi law, that the factors were exclusive, or that consideration of these factors was required. To the contrary, these factors, according to Mr. Wolfson[,] are non-exclusive considerations that "*might possibly* enter into a Saudi judge's perception of the equities" in this case. Mr. Wolfson clearly opined that "[a] Saudi Arabian judge enjoys considerable discretion to rule in a manner leading to what he perceives as a fair and just result."... The Court did not find during the Saudi law hearing, nor does it find now, that Mr. Wolfson's list of factors reflects established Saudi law...based upon the authoritative texts...." The Court noted during the Saudi law hearing that Professor Hallaq and Dr. Vogel did not identify any such list of factors and there was no evidence to suggest that such a list of factors had ever been embraced by the Hanbali school. Nowhere in Dr. Vogel's pretrial affidavits or in his post-trial affidavits does he provide the Court with authority in the Hanbali texts or otherwise to support a jury instruction on these...factors.... [A]nd while the Court certainly considered Mr. Wolfson's list of factors in the context [in which] they were presented...the Court believed then, as it does now, that it would be error to instruct the jury on these factors. The Court did not

want to supply to the jury an incomplete list of factors or suggest factors that, under Saudi law, are not "factors" embraced by the Hanbali school.[93]

The trial judge's second reason was that to instruct on those factors would confuse and mislead the jury:

> Moreover, the Court did not believe that the jury would be able to meaningfully engage in an analysis of each of the factors without creating tremendous confusion and uncertainty. This situation is a good example of the difficulty in applying Saudi law in a *jury* trial. A Saudi judge exercises tremendous discretion and is not bound by precedent. A Saudi judge is free to consider whatever evidence he feels is worth considering and disposing of any evidence he does not consider worthwhile. In other words, under the Saudi legal system, Delaware Rule of Evidence 403 has no place. Here, the Court exercised its discretion in determining not only what the Saudi law is, but how it should be explained to the jury. Obviously, many of the concepts of Saudi Arabian law are not easily understandable to a U.S. judge, much less a lay person in the United States. The Court in this case attempted to set forth the elements of the tort and convey to the jury in a clear, understandable manner the circumstances under which *ghasb* damages would be awardable. The Court could not present to the jury every conceivable circumstance under which *ghasb* damages could be awarded, nor could it tell the jury...that it is "rare" for juries to award damages for *ghasb*.... The factors Mr. Wolfson suggested are factors that a judge *could* analyze. The factors invite considerations that an American jury would not be permitted to consider, such as "a desire to find the middle ground between competing litigants," in other words, a compromise verdict or a consideration of

[93] *Id.* at *2 (italics in original, internal footnotes omitted).

> the consequences of the jury verdict. Factor 5 may have prompted the jury to balance ExxonMobil's right to recover any wrongfully taken principal amounts against the *possibility* of undue hardship to SABIC. Such an instruction would invite inappropriate considerations by the jury having no place in deliberations and encourage the jury to engage in endless speculation about the "possible" undue hardship that SABIC might experience if ordered to pay damages. In addition, the Court was concerned that Factor 2 impermissibly injected into the case the issue of statute of limitations which the Court had ruled pretrial was contrary to Saudi law. To suggest to the jury that ExxonMobil's delay could be considered...when deciding whether or not to award damages for usurpation flies in the face of the Saudi substantive law which provides that property rights are eternal and cannot be extinguished by the passage of time.[94]

On appeal, SABIC argues that even if the trial court correctly refused to grant judgment to SABIC as a matter of law, the court should nonetheless have granted SABIC a new trial, because the jury was given no guidance on how to properly exercise its otherwise unfettered discretion. Given the difficult circumstances that confronted the trial judge, we cannot conclude that her jury instructions relating to *ghasb*, however succinct, subjected SABIC to any injustice that warrants reversal.

The jury was not given unbridled authority to do whatever it wished. The trial judge plainly instructed the jurors that they could not find for ExxonMobil unless "SABIC wrongfully exercised ownership or possessory rights over [their] property...without consent, which means with blatant or reckless disregard for those property rights." That is, the jury was told that SABIC's state of mind and conduct must

[94] *Id.* (italics in original, internal footnotes omitted).

have been far more culpable than an inadvertent breach of contract.[95] The jury was also instructed that they could, *but need not*, award additional damages beyond damages for breach of contract if they concluded that SABIC had committed *ghasb*. And, if, in that event, the jury made a discretionary decision to award additional damages, the trial judge cabined that discretion by limiting any additional award to "any profits you may determine SABIC derived by using in its operations the money, if any, that was usurped...." These instructions flowed from the trial judge's legal determination, based upon Saudi law principles well grounded in the expert testimony that she accepted, that if the jury found that SABIC committed *ghasb* as she defined it, an award of damages so limited would do justice.

If the trial judge, based upon the identical record, had reached the same result in a bench trial as the jury did in this trial, SABIC would have had no ground to attack that result as contrary to law or equity. By parity of reasoning, the verdict reached by the jury here—a product of the combined effort of the jurors and of the trial judge who circumscribed the jury's discretion in accordance with her application of *ijtihad*—affords SABIC no independent basis for reversal.[96]

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[95] The jury was told that, at a bare minimum, it must find that SABIC acted with "reckless disregard" for ExxonMobil's rights.

[96] Even if the trial judge's instructions were regarded as giving the jury an implicitly binary choice regarding damages—*i.e.*, to award damages as she formulated them or to award no additional damages beyond damages for breach of contract—that binary choice worked no fundamental unfairness upon SABIC. For a jury to find that a party that recklessly disregarded the property rights of another should be required to disgorge all profits it wrongly obtained, is hardly alien to our tradition. Nor would be an order requiring full disgorgement by a party committing tortious conduct inconsistent with Saudi law. In large measure, SABIC's argument reduces to a contention that the trial judge erred by not instructing the jury that it could, based on some generalized sense of equity, award partial, rather than full, disgorgement, once it found that additional damages for *ghasb* were warranted.

To the extent SABIC suggests that the result would have been different had the case been litigated in Saudi Arabia, that argument, even if true, has no greater merit than would the argument that a jury verdict should be set aside because another jury would have decided the case differently, or that an equitable decree should be set aside because another chancellor might have crafted a different remedy. Arguments of that kind have never, for good and obvious reason, found favor under our law, and they find no favor here.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court awarding damages to ExxonMobil, and against SABIC, is affirmed. The mandate shall issue forthwith.

Supreme Court, U.S.
FILED
NOV 24 2004
OFFICE OF THE CLERK

(5)

No. 03-1696

In the
Supreme Court of the United States

EXXON MOBIL CORPORATION, *ET AL.*,
Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF DEFENDERS OF PROPERTY RIGHTS, NEW ENGLAND LEGAL FOUNDATION, OREGONIANS IN ACTION, SAVE OUR SHORELINE, AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Nancie G. Marzulla*
Roger J. Marzulla
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
(202) 822-6770

*Counsel of Record for *Amici Curiae*

QUESTION PRESENTED

Amici curiae will address the following question:

May the *Rooker-Feldman* doctrine, which bars lower federal courts from conducting de facto appellate review of decisions by state courts, be expansively interpreted to divest federal courts of jurisdiction to hear takings cases that have been ripened in state court in compliance with *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)?

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Amici curiae submits this brief in support of petitioner.[1] *See* S. Ct. Rule 47.3. Both parties have

[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* contributed financially to the preparation of this brief.

consented to the filing of this brief.

INTERESTS OF AMICI CURIAE

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Since its inception, Defenders has participated in every major property rights case before the U.S. Supreme Court. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998);

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Bennett v. Spear*, 520 U.S. 154 (1997); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

New England Legal Foundation is a non-profit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign*

Trade Council, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster,* 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied,* 532 U.S. 1048 (2001).

Oregonians in Action is a non-profit organization devoted solely to fighting for property rights and against excessive land use regulations. It works for sensible, fair and flexible land-use regulations and to protect property rights. OIA's exclusive focus on land-use/property rights stems from its concerns about the harm and adverse impacts from land use regulations, not only with respect to landowners, but also to the economy and best interests of the public as well.

OIA works primarily in the legislative and regulatory arena, seeking needed reforms to existing land-use laws and regulations at the federal, state and local levels. However, OIA has also been active in pursuing judicial action, seeking greater awareness and understanding of the issues, involvement in the election of candidates for public office and involvement in ballot measures.

Save Our Shoreline is a grass-roots organization of over 2,000 property owners along Michigan's Great Lakes shoreline. Formed in 2001, SOS staunchly opposes assertions of government ownership and control over private property, including shorelands that have, since statehood, been considered by the bench, the bar, and the public, to be privately owned.

In its brief history, SOS has participated as *amicus curiae* before the U.S. Supreme Court in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 536 U.S. 903 (2002) (contesting expansion of federal regulatory control over beaches via the Clean Water Act) and before the Michigan Court of Appeals in *Glass v. Goeckel*, 683 N.W.2d 719 (Mich. App. 2004) and its appeal to the Michigan Supreme Court, Docket No. 126409 (asserting private ownership to the water's edge, including exclusive use and trespass control).

Southeastern Legal Foundation is a public interest law firm, specializing in the practice of constitutional law. SLF was founded in 1976 for the purpose of engaging in litigation, education and public policy initiatives in support of free enterprise, individual

rights and the freedoms guaranteed by the United States Constitution.

SLF has participated as *amicus curiae* in cases throughout the United States involving constitutional and policy issues. *See, e.g., Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); *City of Richmond v. Croson*, 488 U.S. 469 (1989). In addition to its *amicus* work, SLF maintains an active litigation docket, focusing on constitutional issues of first impression, including *United States House of Representatives v. Department of Commerce*, 525 U.S. 316 (1999) (census enumeration); *McConnell v. FEC*, 540 U.S. 93 (2003) (political speech).

SUMMARY OF ARGUMENT

At issue in the case is the proper interpretation of the *Rooker-Feldman* doctrine, which applies when a losing party "seeks now [what] is nothing more than appellate review of the state court ruling in the lower federal courts." *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 199 (4th Cir. 2000). The purpose of this brief *amici curiae* is to urge the Court to construe the *Rooker-Feldman* doctrine narrowly, so as not to divest federal courts of jurisdiction to hear federal constitutional takings cases that have been first

litigated in state courts in order to comply with this Court's state-court exhaustion requirement. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.").

Although a narrow interpretation of the *Rooker-Feldman* doctrine may have its place in legitimate federal preclusion jurisprudence and traditional notions of federalism, a mindlessly expansive interpretation, applied by many lower courts, combined with the *Williamson County* exhaustion requirement, places federal takings plaintiffs in an untenable Catch-22 position: file first in federal court and have their claim denied on ripeness grounds (*Williamson County*) or file first in state court and have their federal court claim dismissed on *Rooker-Feldman* grounds. *See generally* J. David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception*

Open the Federal Courthouse Door to Ripe Takings Claims, 18 J. Land Use & Envtl. L. 209, 210-11 (2003) ("As commentators have long noted, the ripeness prongs established in Williamson County create powerful barriers to landowners seeking to have their takings claims heard on the merits in federal court. When combined with preclusion doctrines, the state procedures requirement is particularly pernicious. In many cases, it has been applied to close the federal courthouse door to attempts to vindicate federal rights under the Takings Clause, a situation that cannot be reconciled with the Court's opinion in Williamson County or with the well-established role of federal courts in enforcing federal constitutional law."); William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 St. Louis U. L.J. 833, 855 n.118 (2002) ("[T]he second part of the Williamson County test, exhaustion of state compensation procedures, has also created problems. These problems deal with preclusion and landowners' inability to bring a claim in federal court after pursuing all available remedies on the state level, which often includes bringing an action in state court. . . .

Assuming that property owners must ripen their takings cases by litigating in state court first, federal courts are refusing to hear takings claims that were already litigated before state tribunals. Thus, the synergy between the preclusion doctrines and current ripeness rules is that owners are forced to litigate their constitutional takings claims in state court, without ever receiving a federal adjudication on the merits.").

Barring federal constitutional claims from review by a federal court could not have been intended by Congress when enacting Section 1983 to give plaintiffs a right to seek redress for such claims in federal court. *See* 42 U.S.C. § 1983. Yet, such is the combined result of the *Rooker-Feldman* Doctrine and the *Williamson County* state-court exhaustion doctrine. As one commentator noted:

> Either the Supreme Court meant something when it decided Williamson County, or it did not. If the latter is true, the Court was merely uttering meaningless rhetoric, with no more purpose than to stave off the day of intellectual reckoning. If, however, the Supreme Court meant what it repeatedly said, that a claim for just compensation for a regulatory taking of property is ripe for litigation on the merits in federal district court

once a final, unfavorable regulatory decision has been issued by the state courts then it is incumbent on the lower federal courts to give meaning to that decision. They cannot, with any degree of intellectual honesty, apply by rote the general precepts of claim and issue preclusion without noting the destructive impact on those general rules of the core holding of Williamson County. . . . Whether by design or blunder, the Supreme Court justices created a system in which they instructed property owners with constitutional claims to litigate the same factual case twice: once, under state law in state court, and then, if they so chose, again in federal court under federal law. It is simply impermissible to say that when the Supreme Court did so, it meant to create a system in which property owners are deliberately duped into giving up their right to federal litigation of federal constitutional issues because they do their best to comply with Williamson County's clear holding.

Michael M. Berger, *Evolving Voices in Land Use Law: A Festchrift in Honor of Daniel R. Mandelker, Part II: Discussions on the National Level, Chapter 3: Takings Issues*, 3 Wash. U. J.L. & Pol'y 99, 131-32 (2000).

In order to avoid stripping federal courts of the

ability to hear claims resting on federal constitutional rights, some courts have held that the *Rooker-Feldman* doctrine is inapplicable to cases where the litigation in state court was necessitated under *Williamson County*. *See e.g., Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (11th Cir. 1999) (rejecting the applicability of the *Rooker-Feldman* doctrine in a takings case).

Similarly, in *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964), this Court held that the federal court was not precluded from hearing a case where the federal court had abstained, and sent the case to the state court to decide. At the end of the state court litigation, the litigants returned to federal court only to be dismissed because "'the courts of Louisiana have passed on all issues raised, including the claims of deprivation under the Federal Constitution.'" *Id.* at 414 (citation omitted). This Court held that subsequent review by a federal court was not barred because the litigant was involuntarily in state court (as a result of abstention), and therefore his return to federal court would not be barred as an "appeal" of the state court decision. *Id.* at 415-19. This Court reasoned:

> [I]n cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination. The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

Id. at 417.

Amici curiae urge this Court to likewise narrowly construe the *Rooker-Feldman* doctrine so that it does not apply or does not divest federal courts of jurisdiction to hear takings claims ripened under the *Williamson County* state court exhaustion requirement.

ARGUMENT

I. Application of the *Rooker-Feldman* Doctrine in Takings Cases Subject to the *Williamson County* State Exhaustion Ripeness Requirement Has the Unintended Consequence of Divesting Federal Courts of the Ability to Hear Federal Constitutional Takings Claims.

The *Rooker-Feldman* doctrine, named for *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of*

Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), stands for the proposition that a party aggrieved by a state-court decision cannot appeal that decision to a district court, but must instead petition for a writ of certiorari from the United States Supreme Court.

As the Fourth Circuit has explained:

> [T]he Rooker-Feldman doctrine . . . rests on two basic propositions of federal jurisdiction. First, Congress has vested the authority to review state court judgments in the United States Supreme Court alone. The Rooker-Feldman doctrine thus "interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in [the Supreme] Court." Second, Congress has empowered the federal district courts to exercise only original jurisdiction.

Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 198-99 (4th Cir. 2000) (citations omitted); *see generally* Susan Bandes, *The Rooker-Feldman Doctrine: Evaluating Its Jurisdictional Status*, 74 Notre Dame L. Rev. 1175 (1999); Jack M. Beermann, *Comments on Rooker-Feldman or Let State Law Be Our Guide*, 74 Notre Dame L. Rev. 1209 (1999); Barry Friedman & James E. Gaylord, *Rooker-*

Feldman, from the Ground Up, 74 Notre Dame L. Rev. 1129 (1999).

In the typical case in which the *Rooker-Feldman* doctrine is applied, the federal plaintiff is a losing party in a state judicial proceeding and seeks an order from a federal court to reverse the state court's decision. This Court has broadly construed the *Rooker-Feldman* doctrine, holding that a federal claim may also be considered an appeal from a state court decision if the issues raised by the parties in federal court even if they are merely "'inextricably intertwined'" with the issues they litigated in state court. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (citation omitted).

Federal courts, as the Third Circuit did in this case, have even more expansively interpreted the *Rooker-Feldman* doctrine to apply to any federal case in which the parties are the same and the claims are similar. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102 (3d Cir. 2004).

Such expansive interpretations of the *Rooker-Feldman* doctrine have severe consequences when applied in a case where the plaintiff is seeking just compensation

for state action under the Fifth Amendment to the U.S. Constitution. *See, e.g., Johnson v. City of Shorewood,* 360 F.3d 810, 818-19 (8th Cir. 2004) ("To the extent the Johnsons' alleged constitutional injury stems from claims adjudicated in the prior state court judgment, the district court lacked jurisdiction under *Rooker-Feldman* because the Johnsons are essentially challenging the state judgment as inadequate and are 'asking the federal court for the same remedy requested in the state court action: just compensation.'") (citation omitted); *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 493 (6th Cir. 2001) (holding that district court had correctly applied Rooker-Feldman doctrine to dismiss plaintiff's taking claims); *Hill v. Town of Conway*, 193 F.3d 33, 40 (1st Cir. 1999) (holding that Rooker-Feldman doctrine deprived it of jurisdiction since state court had already determined that plaintiffs were not entitled to just compensation); *Ritter v. Ross*, 992 F.2d 750, 755 (7th Cir. 1993) (holding that Rooker-Feldman deprived court of jurisdiction over Section 1983 action for just compensation because plaintiffs were asking court to review state court foreclosure judgment).

In federal takings cases involving state action, although the claim is founded directly on the federal Constitution, unlike all other federal constitutional rights, a plaintiff in a Fifth Amendment takings case is required by this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), to litigate his case first in state court, lose, and only then go to federal court for review.[2] *Id.* at 195 ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 n.8 (1997) ("Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a takings suit in federal court unless the State does not provide adequate remedies for obtaining compensation.").

This process virtually begs a federal court to employ such preclusion doctrines as the *Rooker-Feldman* doctrine, because in any other context, a litigant who litigates in state court, loses, and then takes what appears to be the same claim to a federal court, appears, at best, to be trying for "two bites of the apple." Under *Williamson County*, however, this practice is deemed "ripening":

> Either the court must reconsider Williamson County, or the court must reconcile the concepts of claim and issue preclusion with Williamson County in a manner that preserves the state court ripening process while also preserving the aggrieved citizens' rights. This includes preserving federal court jurisdiction to determine the validity of their federal constitutional claims. By forcing property owners to proceed through a hopeless morass of state court procedures through this misapplication of the doctrine of res judicata, those plaintiffs will never see the inside of a federal courthouse.

Michael M. Berger, *Evolving Voices in Land Use Law: A Festchrift in Honor of Daniel R. Mandelker, Part II:*

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[2] The *Williamson County* judicial exhaustion requirement reflects the fact that the Fifth Amendment's Just Compensation Clause, upon which a takings suit is based, "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 314 (1987). It is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315; *see also Preseault v. ICC*, 494 U.S. 1, 11 (1990).

Discussions on the National Level, Chapter 3: Takings Issues, 3 Wash. U. J.L. & Pol'y 99, 125-126 (2000).

II. The Better View, Adopted by Some Courts, Is To Harmonize the Two Doctrines, Thereby Allowing Takings Litigants Access To Federal Court Review of Their Federal Constitutional Takings Claims.

To avoid the unfairness that is caused when these two irreconcilable rules of law collide in the takings arena, a number of courts have found a way to harmonize the two disparate requirements. For example, a few Circuit Courts of Appeal have simply declined to apply the *Rooker-Feldman* doctrine in takings cases where the state court could not or did not reach the federal takings claim on its merits. In *Gulla v. North Strabane Township*, 146 F.3d 168 (3d Cir. 1998), the plaintiffs' suit in state court to invalidate a zoning decision was dismissed for lack of standing. The *Gulla* plaintiffs then filed their constitutional case in the federal court. Noting that a dismissal for lack of standing is not an adjudication on the merits, the Third Circuit concluded that the Gullas had the right to try those claims in federal court despite the *Rooker-Feldman* doctrine:

> In this case, we conclude that the Gullas are not precluded from bringing their federal claims because the state court could not and did not adjudicate the merits of their constitutional claims. Rather, the state court noted that the Gullas lacked standing to raise their constitutional claims in an appeal of the Board's subdivision decision. Since the Gullas could not obtain an adjudication of their claims in state court, they are not precluded from raising their constitutional claims in the federal forum.

Id. at 173 (citations omitted).

In *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (11th Cir. 1999), the Eleventh Circuit rejected the applicability of the *Rooker-Feldman* doctrine in a case where the owner of a waste recycling facility first brought suit in state court challenging revocation of its operating permit and then, after losing, brought suit in federal district court for the taking of its business without just compensation. The just compensation issue was not and could not have been tried in the state court case, the court explained, because the claim for the denial of just compensation did not arise and, indeed, could not have arisen until after the permit was revoked and the property taken. Since no such proceeding had occurred, *Rooker-*

Feldman had no applicability to the case. *Id.* at 1232; *see also Santini v. Connecticut Hazardous Waste Management Service,* 342 F.3d 118, 121 (2d Cir. 2003) ("Because Santini did not raise, and could not have raised, his federal takings claim in the state court action, we conclude that the *Rooker Feldman* doctrine and res judicata do not apply."); *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699, 703 (7th Cir. 1998) (rejecting *Rooker-Feldman* doctrine in case alleging inverse condemnation: "Centres does not allege an injury from the state court judgment itself; rather, it challenges the actions of the defendants. Thus, Centres seeks to ignore the state court judgment rather than to have the federal court sit as an appellate court and overrule the state court determination."); *Gooden v. Faulkner County Sheriff's Dep't*, 129 F.3d 121, 1997 WL 692993 at *1, 1 (8th Cir. Nov. 7, 1997) ("Upon de novo review, we disagree that Gooden's claim was barred by the Rooker-Feldman doctrine.").

Recently, in *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004), the Sixth Circuit found the *Rooker-Feldman* doctrine inapplicable because the takings claim at issue had not been tried on its merits in the state court. In

DLX, a plaintiff who was denied a state permit to mine in an area designated as a National Natural Landmark sued the state under Section 1983 for a taking of its property without just compensation. Prior to filing suit in federal court, the plaintiff had sought relief in state court; its case was dismissed in the state trial court on ripeness grounds, but then reversed by an intermediate court of appeals. The Supreme Court of Kentucky upheld the dismissal based on the lack of exhaustion of administrative remedies. When the plaintiff brought suit in federal court, the state moved for dismissal under the *Rooker-Feldman* doctrine. The Sixth Circuit held that the *Rooker-Feldman* doctrine did not apply because an administrative exhaustion requirement is not a component of a federal takings claim and thus, the district court could have concluded that DLX had established a regulatory taking of its property under the Fifth Amendment and was entitled to relief without undermining any of the state court's conclusions. *Id.* at 517-18. The Sixth Circuit was disturbed, however, by what it viewed as a continuing conflict between the *Rooker-Feldman* doctrine and *Williamson County*'s requirements:

> If DLX had in fact been allowed in the state

> courts to reach the merits of its taking claim and then lost, it is likely that the formula adopted by this circuit as applied in our past cases would require *Rooker-Feldman* abstention, in evident tension with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195-97 (1985), which clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court. The catch-22 of the "*Williamson* trap" . . . with respect to res judicata is also evident with respect to the *Rooker-Feldman* doctrine. We do not need to confront these tensions in this case, however, and express no opinions as to the resolution of this conflict.

Id. at 518 n.3.

CONCLUSION

For all of these reasons, *amici curiae* urge this Court to construe the *Rooker-Feldman* doctrine in a way that does not divest federal courts of jurisdiction to hear Fifth Amendment takings claims that have been ripened in compliance with *Williamson County*.

Respectfully submitted,

Nancie G. Marzulla*
Roger J. Marzulla

DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., N.W.
Suite 410
Washington, DC 20036
(202) 822-6770

*Counsel of Record for *Amici Curiae*

Date: November 26, 2004